Shefali Shenoy Choo Suat Chin & Ors v Potential Excelerate Group Ltd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-279–06 OF 2021
LIZA CHAN JC
25 APRIL 2022

Civil Procedure — Striking out — Writ and statement of claim and counterclaim — Whether plaintiffs' claim was not so obviously unsustainable that it had to be struck out under O 18 r 19 Rules of Court 2012 ('ROC') — Whether defendants' counterclaim against plaintiffs for malicious prosecution was premature and had to be struck out as main suit had yet to be decided in defendants' favour — Whether counterclaim failed to plead particulars of malice against plaintiffs contrary to O 18 r 12(1) ROC — Whether counterclaim quantified general damages contrary to O 18 r 12(1A) ROC — Whether plaintiffs failed to provide solid evidence for court to issue Mareva injunction to prevent defendants from dissipating assets — Whether court would not usurp function of Securities Commission ('SC') to determine whether defendants had breached securities law — Whether court would only issue order to freeze defendants' assets under s 360(1)(d)(D) and 360(2) of Capital Markets and Services Act 2007 if SC had first determined that defendants had contravened securities law

The instant judgment dealt with five applications: (a) the plaintiffs' application ('encl 10') to strike out the defendants' counterclaim under O 18 r 19 of the Rules of Court 2012 ('the ROC'); (b) the plaintiffs' application ('encl 11') to freeze the assets of the defendants either under s 360(1)(d)(D) and 360(2) of the Capital Markets and Services Act 2007 ('the CMSA') or by way of a Mareva injunction; and (c) three applications ('encls 13, 18 and 20') of the third, fourth and fifth defendants ('D3, 'D4' and 'D5') to strike out the plaintiffs' writ and statement of claim under O 18 r 19 of the ROC. The plaintiffs' common grievance was that they were deceived by representations made by D3 and D5 into investing monies in an investment scheme carried on by all the defendants which eventually turned out to be a sham. The plaintiffs — who altogether invested a total sum of RM1,309,300 in the scheme — raised claims of fraud, conspiracy to defraud, monies had and received and unjust enrichment against the defendants and sought, inter alia: (i) a declaration that the shares subscription agreements that the plaintiffs had entered into with the defendants were void and unlawful; (ii) a declaration that the defendants had at all material times breached the CMSA and other relevant securities laws; (iii) an order that the defendants jointly and severally refund to the respective plaintiffs the monies they had invested in the investment scheme; (iv) alternatively, the defendants jointly and severally make restitution to the plaintiffs in respect of

A the invested monies; (v) aggravated and exemplary damages and general damages (to be assessed); (vi) an inquiry into accounts; and (v) an injunction to restrain the defendants from disposing of their assets. The defendants, in turn, counterclaimed against the plaintiffs for, inter alia, RM10m in general damages for malicious prosecution on the ground the instant suit against them
B was filed out of malice. In support of encls 13, 18 and 20, the defendants raised the following matters: (A) that the suit was defective in that the plaintiffs should not have sued jointly in one action as each of them had signed separate agreements in the investment scheme and were claiming different amounts;
C (B) the court had no jurisdiction to try or hear the suit because the agreements that the plaintiffs had signed individually with the first defendant ('D1'), an offshore company, contained an exclusive jurisdiction clause which said that only the courts in Seychelles should adjudicate the disputes between the parties; and (C) since the amounts claimed by each plaintiff was less than
D RM1m, their respective claims should have been filed in the subordinate courts.

Held, allowing encl 10 and dismissing encls 11, 13, 18 and 20:
Enclosure 10:

E (1) The defendants' counterclaim was premature as the proceedings herein had not terminated in their favour. Also, contrary to O 18 r 12(1) of the ROC, the defendants had not pleaded any particulars of malice against the plaintiffs or particulars of the plaintiffs' alleged lack of probable cause in filing the suit. Furthermore, contrary to O 18 r 12(1A) of the ROC,
F the defendants had quantified RM10m as general damages, giving rise to the poser whether the counterclaim was made to intimidate the plaintiffs and extort a relief which the defendants were not entitled to. The counterclaim was obviously unsustainable and justice demanded that it be struck out (see paras 44, 47–48 & 50).
G *Enclosures 13, 18 and 20*:

(2) The plaintiffs' statement of claim raised causes of action against the defendants for misrepresentation, fraud, monies had and received, unjust enrichment, breaches of the CMSA and conspiracy to defraud and injure
H the plaintiffs. Whether the plaintiffs would be able to prove those facts was a matter of evidence to be adduced at the trial and not to be determined summarily. Plainly, it was not an obviously unsustainable claim (see para 16).

I (3) The court was not satisfied and could not with confidence conclude that the plaintiffs' claim disclosed no reasonable cause of action or was so conspicuously hopeless, baseless or without foundation in law or in equity that it was doomed to fail or that it was an abuse of court process. The disputes of facts raised were capable of resolution only after viva voce evidence was taken during trial. The issues raised required mature

consideration. At this interlocutory stage, the court was not concerned with the merits or otherwise of the claim or how strong or weak the plaintiffs' case was. The action was therefore unsuitable for summary striking out under O 18 r 19 of the ROC (see paras 35–37).

(4) It served no useful purpose to remit the plaintiffs' claims to the subordinate courts where it was possible that different courts hearing the matters based on the same facts might come to different findings or decisions. Letting the suit remain in the High Court would avoid such a potentially embarrassing outcome, particularly when D3, D4 and D5 had not shown that they would suffer any prejudice. There was no fundamental irregularity in the filing of the suit in the High Court which O 1A and O 2 r 1(3) of the ROC could not cure, nor had it caused D3, D4 and D5 any substantial miscarriage of justice (see para 24).

(5) The jurisdictional challenge raised by D3, D4 and D5 was utterly bereft of merit as, inter alia: (a) they were not parties to the agreements that contained the exclusive jurisdiction clause. Those agreements were between D1 and the respective plaintiffs; (b) they did not, within the time limited for filing their defence, apply to court under O 12 r 10(1) or (2) of the ROC for a declaration that the court had no jurisdiction over them or for a stay of proceedings on the ground that Malaysia was not the proper forum to hear the dispute. Absent such application, their entering an appearance and filing their defence and counterclaim as well as encls 13, 18 and 20 clearly demonstrated their submission to the jurisdiction of the court; and (c) in determining whether the High Court had jurisdiction over D3, D4 and D5, case-law of high authority have held that the plaintiffs' allegations in the statement of claim must be presumed to be true, and if that was the case, the action fell within the ambit of s 23(1)(a), (b) and (c) of the Courts of Judicature Act 1964 to give the High Court of Malaya the jurisdiction to try this action (see para 25).

(6) Notwithstanding that each of the plaintiffs herein had entered into separate agreements with the relevant defendant and that the amount that each of them claimed was different, their common grievance against the defendants raised common questions of law and facts. As such, they were entitled to sue together as plaintiffs in one action pursuant to O 15 r 4 of the ROC. The plaintiffs also met the criteria under O 15 r 12(1) of the ROC to bring a representative action as they were a class of persons with a common interest and common grievance and sought a common relief. No action shall be defeated by reason of the misjoinder or non-joinder of parties (per O 15 r 6(1) of the ROC) and any defect in the description of parties could be easily rectified by way of amendment (see paras 27 & 29).

Enclosure 11:

(7) The plaintiffs had not satisfied the requirements for the grant of a Mareva injunction. It was wrong for the court to conclude that there was risk of dissipation of assets merely because allegations of fraud or dishonesty had been made. Those allegations had yet to be proven at trial (see paras 72 & 77).

(8) There was no solid evidence to show a real risk or danger that the defendants would dispose of their assets to frustrate the plaintiffs from recovering the fruits of their litigation. Mere fear that the assets would be dissipated as opposed to actual evidence of a real risk or danger of dissipation was insufficient. The defendants' refusal to pay fell far too short of the evidence necessary to establish real risk of dissipation. In the circumstances, arming the plaintiffs with a Mareva injunction would put them in the position of a secured creditor (see paras 73–75).

(9) The plaintiffs did not plead that they had complained to the Securities Commission ('SC') about the defendants' alleged breach of the CMSA or other securities law; neither did they plead that the SC had already determined the alleged contravention of the securities law concerned. The court was bound by stare decisis to hold that until the SC had determined that there was any contravention of the relevant securities law, a claim based on alleged breaches of the CMSA would fail in limine as it was not the court's function to usurp the role of the regulatory body. Accordingly, the plaintiffs' recourse was with the SC and not the court. There was therefore no basis for the court to issue a 'freezing order' under s 360(1)(d)(D) or s 360(2) of the CMSA (see paras 56–69).

[Bahasa Malaysia summary

Penghakiman ini menangani lima permohonan: (a) permohonan plaintif ('lampiran 10') untuk membatalkan tuntutan balas defendan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM'); (b) permohonan plaintif ('lampiran 11') untuk membekukan aset defendan sama ada di bawah ss 360(1)(d)(D) dan 360(2) Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP') atau melalui injunksi Mareva; dan (c) tiga permohonan ('lampiran 13, 18 dan 20') defendan ketiga, keempat dan kelima ('D3', 'D4' dan 'D5') untuk membatalkan writ dan pernyataan tuntutan plaintif di bawah A 18 k 19 KKM. Kilanan bersama plaintif ialah mereka telah ditipu oleh penyataan yang dibuat oleh D3 dan D5 untuk melaburkan wang dalam skim pelaburan yang dijalankan oleh semua defendan yang akhirnya adalah satu penipuan. Plaintif — yang kesemuanya melabur sejumlah RM1,309,300 dalam skim itu — membangkitkan tuntutan penipuan, konspirasi untuk menipu, wang yang telah dan diterima serta pengayaan yang tidak adil terhadap defendan dan memohon, antara lain: (i) pengisytiharan bahawa perjanjian langganan saham yang telah dibuat oleh plaintif dengan defendan adalah tidak sah dan menyalahi undang-undang; (ii) pengisytiharan bahawa defendan pada setiap masa material telah melanggar APMP dan undang-undang sekuriti lain yang

berkaitan; (iii) perintah yang defendan secara bersama dan berasingan membayar balik kepada plaintif masing-masing wang yang telah mereka laburkan dalam skim pelaburan; (iv) secara alternatif, defendan secara bersama dan berasingan membuat pengembalian kepada plaintif berkenaan dengan wang yang dilaburkan; (v) ganti rugi teruk dan teladan dan ganti rugi am (untuk dinilai); (vi) siasatan ke atas akaun; dan (v) injunksi untuk menghalang defendan daripada melupuskan aset mereka. Defendan, seterusnya, menuntut balas terhadap plaintif untuk, antara lain, RM10 juta sebagai ganti rugi am untuk pendakwaan berniat jahat atas alasan saman ini terhadap mereka difailkan kerana niat jahat. Bagi menyokong lampiran 13, 18 dan 20, defendan membangkitkan perkara berikut: (A) bahawa saman itu rosak kerana plaintif tidak sepatutnya menyaman bersama dalam satu tindakan kerana setiap daripada mereka telah menandatangani perjanjian berasingan dalam skim pelaburan dan telah menuntut jumlah yang berbeza; (B) mahkamah tidak mempunyai bidang kuasa untuk membicarakan atau mendengar saman itu kerana perjanjian yang telah ditandatangani oleh plaintif secara individu dengan defendan pertama ('D1'), sebuah syarikat luar pesisir, mengandungi klausa bidang kuasa eksklusif yang mengatakan bahawa hanya mahkamah di Seychelles harus mengadili pertikaian antara pihak-pihak; dan (C) memandangkan jumlah yang dituntut oleh setiap plaintif adalah kurang daripada RM1 juta, tuntutan masing-masing sepatutnya difailkan di mahkamah bawahan.

Diputuskan, membenarkan lampiran 10 dan menolak lampiran 11, 13, 18 dan 20:
Lampiran 10:

(1) Tuntutan balas defendan adalah terlalu awal kerana prosiding di sini tidak ditamatkan memihak kepada mereka. Selain itu, bertentangan dengan A 18 k 12(1) KKM, defendan tidak memplid sebarang butiran niat jahat terhadap plaintif atau butiran plaintif yang didakwa kekurangan kausa berkemungkinan dalam memfailkan saman. Tambahan pula, bertentangan dengan A 18 k 12(1A) KKM, defendan telah mengkuantifikasikan RM10 juta sebagai ganti rugi am, yang menimbulkan sama ada tuntutan balas dibuat untuk menakutkan plaintif dan memeras relif yang defendan tidak berhak. Tuntutan balas itu jelas tidak dapat dikekalkan dan keadilan menuntut agar ia dibatalkan (lihat perenggan 44, 47–48 & 50).
Lampiran 13, 18 dan 20:

(2) Pernyataan tuntutan plaintif menimbulkan kausa tindakan terhadap defendan kerana salah nyata, penipuan, wang yang telah dan diterima, pengayaan yang tidak adil, pelanggaran APMP dan konspirasi untuk menipu dan mencederakan plaintif. Sama ada plaintif akan dapat membuktikan fakta-fakta tersebut adalah satu perkara keterangan yang perlu dikemukakan pada perbicaraan dan bukan untuk ditentukan secara

ringkas. Jelas sekali, ia bukanlah satu tuntutan yang jelas tidak boleh dikekalkan (lihat perenggan 16).

(3) Mahkamah tidak berpuas hati dan tidak boleh dengan yakin menyimpulkan bahawa tuntutan plaintif tidak mendedahkan kausa tindakan yang munasabah atau sangat jelas tidak mempunyai harapan, tidak berasas atau tanpa asas dalam undang-undang atau dalam ekuiti sehingga ia ditakdirkan untuk gagal atau bahawa ia adalah penyalahgunaan proses mahkamah. Pertikaian fakta yang dibangkitkan mampu diselesaikan hanya selepas keterangan viva voce diambil semasa perbicaraan. Isu yang dibangkitkan memerlukan pertimbangan matang. Pada peringkat interlokutori ini, mahkamah tidak mengambil berat tentang merit atau sebaliknya tuntutan atau betapa kuat atau lemahnya kes plaintif. Oleh itu tindakan itu tidak sesuai untuk pembatalan terus di bawah A 18 k 19 KKM (lihat perenggan 35–37).

(4) Ia tidak mempunyai tujuan yang berguna untuk meremitkan tuntutan plaintif kepada mahkamah bawahan jika ada kemungkinan mahkamah yang berbeza yang mendengar perkara berdasarkan fakta yang sama mungkin mendapat penemuan atau keputusan yang berbeza. Membiarkan saman kekal di Mahkamah Tinggi akan mengelakkan keputusan yang berpotensi memalukan, terutamanya apabila D3, D4 dan D5 tidak menunjukkan bahawa mereka akan mengalami sebarang prasangka. Tidak ada ketidakaturan yang terdasar dalam pemfailan saman di Mahkamah Tinggi yang A 1A dan A 2 k 1(3) KKM tidak dapat dibaikpulihkan, dan juga tidak menyebabkan D3, D4 dan D5 apa-apa kegagalan asas keadilan yang ketara (lihat perenggan 24).

(5) Cabaran bidang kuasa yang dibangkitkan oleh D3, D4 dan D5 telah kehilangan merit sama sekali kerana, antara lain: (a) mereka bukan pihak dalam perjanjian yang mengandungi klausa bidang kuasa eksklusif. Perjanjian tersebut adalah antara D1 dan plaintif masing-masing; (b) mereka tidak, dalam masa yang terhad untuk memfailkan pembelaan mereka, memohon kepada mahkamah di bawah A 12 k 10(1) atau (2) KKM untuk pengisytiharan bahawa mahkamah tidak mempunyai bidang kuasa terhadap mereka atau untuk penangguhan prosiding atas alasan bahawa Malaysia bukanlah forum yang sesuai untuk mendengar pertikaian itu. Ketiadaan permohonan sedemikian, kehadiran mereka dan memfailkan pembelaan dan tuntutan balas mereka serta lampiran 13, 18 dan 20 jelas menunjukkan penyerahan mereka kepada bidang kuasa mahkamah; dan (c) dalam menentukan sama ada Mahkamah Tinggi mempunyai bidang kuasa ke atas D3, D4 dan D5, autoriti tinggi kes undang-undang telah memutuskan bahawa dakwaan plaintif dalam pernyataan tuntutan mesti dianggap benar, dan jika itu berlaku, tindakan itu termasuk dalam lingkungan s 23(1)(a), (b) dan (c) Akta Mahkamah Kehakiman 1964 untuk memberi Mahkamah Tinggi Malaya bidang

kuasa untuk membicarakan tindakan ini (lihat perenggan 25).

(6) Walaupun setiap plaintif di sini telah memeterai perjanjian berasingan dengan defendan yang berkaitan dan jumlah yang dituntut oleh setiap daripada mereka adalah berbeza, kilanan bersama mereka terhadap defendan menimbulkan persoalan undang-undang dan fakta yang sama. Oleh itu, mereka berhak untuk menyaman bersama sebagai plaintif dalam satu tindakan menurut A 15 k 4 KKM. Plaintif juga memenuhi kriteria di bawah A 15 k 12(1) KKM untuk membawa tindakan wakil kerana mereka adalah kelas orang yang mempunyai kepentingan bersama dan kilanan bersama dan meminta relif yang sama. Tiada tindakan boleh dikalahkan atas sebab kesalahcantuman atau tiada percantuman pihak (seperti A 15 k 6(1) KKM) dan sebarang kecacatan dalam perihalan pihak boleh diperbaiki dengan mudah melalui pindaan (lihat perenggan 27 & 29).
Lampiran 11:

(7) Plaintif tidak memenuhi keperluan untuk pemberian injunksi Mareva. Adalah salah untuk mahkamah membuat kesimpulan bahawa terdapat risiko kehilangan aset semata-mata kerana dakwaan penipuan atau ketidakjujuran telah dibuat. Dakwaan tersebut masih belum dibuktikan dalam perbicaraan (lihat perenggan 73 & 75).

(8) Tiada keterangan kukuh untuk menunjukkan risiko atau bahaya sebenar bahawa defendan akan melupuskan aset mereka untuk mengecewakan plaintif daripada mendapatkan semula hasil litigasi mereka. Ketakutan semata-mata bahawa aset akan dilesapkan berbanding dengan keterangan sebenar risiko atau bahaya sebenar pelesapan adalah tidak mencukupi. Keengganan defendan untuk membayar adalah kurang daripada keterangan yang diperlukan untuk mewujudkan risiko sebenar pelesapan. Dalam keadaan itu, mempersenjatai plaintif dengan injunksi Mareva akan meletakkan mereka dalam kedudukan pemiutang terjamin (lihat perenggan 73–75).

(9) Plaintif tidak memplid bahawa mereka telah mengadu kepada Suruhanjaya Sekuriti ('SC') tentang dakwaan defendan melanggar APMP atau undang-undang sekuriti lain; mereka juga tidak memplid bahawa SC telah pun menentukan dakwaan pelanggaran undang-undang sekuriti berkenaan. Mahkamah terikat dengan stare decisis untuk memutuskan bahawa sehingga SC memutuskan bahawa terdapat sebarang pelanggaran undang-undang sekuriti yang berkaitan, tuntutan berdasarkan dakwaan pelanggaran APMP akan gagal sepenuhnya kerana ia bukan fungsi mahkamah untuk merampas peranan badan kawal selia tersebut. Sehubungan itu, tindakan plaintif adalah dengan SC dan bukannya mahkamah. Oleh itu, tiada asas untuk mahkamah mengeluarkan 'perintah pembekuan' di bawah s 360(1)(d)(D) atau s 360(2) APMP (lihat perenggan 56–59).]

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Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal [2013] 1 MLJ 158; [2012] 8 CLJ 678, CA (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)
Tuan Hj Zulkifli bin Hj Hussain & Ors v IOI Corp Bhd & Ors [2012] 7 MLJ 215, HC (refd)
Zarina bt Sharil & Anor v Chiong Chuan Hwa & Ors [2009] 2 MLJ 124, HC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 58, 58(1), 174, 178, 179, 199, 360, 360(1)(d), (1)(d)(D), (2)
Courts of Judicature Act 1964 ss 23, 23(1)(a), (1)(b), (1)(c), 25
Rules of Court 2012 O 2 r 1(3), O 1A, O 12 r 10(1), (2), (6), O 15 rr 4, 4(1), (1)(a), (1), 12(1), (1), (1A), O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(d), (2), O 29, O 94(4)
Securities Commission Act 1983

CM Wong (with Alvin Lai) (CM Wong & Denise Chong) for the plaintiffs.
Mohd Fairus bin Ismail (with Ramesh Lachman) (Palany, Fairus & Adib Chambers) for the defendants.

Liza Chan JC:

INTRODUCTION

[1] There are five applications before the court:

(a) the plaintiffs' application in enclosure ('encl') 10 is to strike out the defendant's counterclaim pursuant to O 18 r 19(1)(a) or (b) or (d) and/or under O 94(4) of the Rules of Court 2012 ('the ROC 2012');

(b) the plaintiffs' application for a freezing order and/or an injunction order in the nature of a Mareva injunction order against the defendants pursuant to ss 360(1)(d)(D) or 360(2) of the Capital Markets and Services Act 2007 ('the CMSA') and/or O 29 of the ROC 2012 and/or s 25 of the Courts of Judicature Act 1964 and/or inherent jurisdiction of the court; and

(c) the third, fourth and fifth defendant ('D3, D4 and D5')'s application in encls 18, 13 and 20 respectively to strike out the writ and amended statement of claim ('ASOC') grounded on 'O 18 r 19(1)(a), (b), (d)' of the ROC 2012 and/or under the inherent powers of the court.

[2] On 18 February 2022, I had allowed encl 10 with costs but dismissed encls 11, 13, 18 and 20 with costs. As the matters were related and all heard on the same day, it is convenient to deal with all five enclosures in one judgment.

BACKGROUND

[3] The background facts are culled from the pleadings, cause papers and submissions of the parties.

[4] At all material times:

(a) the plaintiffs are investors in an investment scheme carried on by the defendants;

(b) D3 and D5 had represented to the plaintiffs, inter alia, that:

(i) PE Group has joint collaboration project with other companies such as Rtist which will increase the value of the shares of PE Group;

(ii) PE Group will be listed as a public limited company in England and the shares of PE Group will be issued to the plaintiffs within two years from the date of agreements; and

(iii) the plaintiffs will get a profit of minimum of three to five times more than what they invest.

(c) in reliance on D3 and/or D5's representations and assurance to the plaintiffs, the plaintiffs agreed to invest in D3 and D5's company;

(d) D3 and/or D5 and/or its representatives has requested the plaintiffs to pay the investment amount to D2, a company registered in Malaysia wherein D3 and D4 are the directors and shareholders of the D2, and D5 is one of the cheque signatories for D2 together with D3; D3 and D5 had assured the plaintiffs that D2 is a subsidiary of the Potential Excelerate Group Ltd (D1) and both D2 and D1 were owned by D3;

(e) based on D3 and D5's representations, the plaintiffs paid a total sum of RM1,309,300 to D2's Standard Chartered account No 794194676674 ('D2's account');

(f) D3 prepared the convertible note purchase agreements that were entered between the plaintiffs and D1, an offshore company in Seychelles wherein D3 is a Director;

(g) D3 and/or D5 had represented to the plaintiffs that D1 has complied with all conditions imposed by Bank Negara and the Securities Commission Malaysia;

(h) no shares were given to any of the plaintiffs upon maturity of the agreements despite an extension of one year given by the first, second, fifth and sixth plaintiffs;

(i) the plaintiffs later discovered that:

(i) the representations made by the defendants were false and/or were made without regard to its truth;

(ii) D2 is merely a two-dollar company and no audit accounts were filed by D3 and D4 since its establishment in 2015;

(iii) D1 did not obtain any licence from the Securities Commission of Malaysia and did not comply with the necessary requirements under the CMSA; and

(iv) D1 and D2 had been used as a vehicle or shield by D3, D4 and D5 to defraud the plaintiffs with no intention to issue shares or refund the monies to the plaintiffs and to avoid any personal liability.

(j) it is also the plaintiffs' claim (paras 135–144 of the ASOC) that the defendants failed to comply with the relevant provisions of the CMSA in relation to the regulated activities and dealing in securities including acquiring and/or subscribing securities;

(k) all the convertible notes purchase agreements are void and illegal; and

(l) there were claims of fraud (paras 107–129 ASOC), conspiracy to defraud (paras 130–134 ASOC), for money had and received and unjust enrichment (paras 146–151 ASOC).

[5] Arising from the claims made, the plaintiffs seek:

(a) a declaration that each and every shares subscription agreement entered into by the respective plaintiffs with the defendants are void and unlawful;

(b) a declaration that the defendants are in breach of the Capital Market and Services Act 2007 and the relevant security law;

(c) the defendants are jointly and severally liable to pay back to the respective plaintiffs the specific sums of monies paid by the plaintiffs under the investment scheme as follows:

(i) RM70,500 to the first plaintiff;

(ii) RM577,500 to the second plaintiff;

(iii) RM205,400 to the third plaintiff;

(iv) RM201,400 to the fourth plaintiff;

(v) RM88,000 to the fifth plaintiff;

(vi) RM51,144 to the fifth plaintiff; and

(vii) RM166,500 to the sixth plaintiff.

(d) alternatively, restitution by the defendants jointly and severally;

(e) aggravated and exemplary damages;

(f) general damages to be assessed;

(g) inquiry into accounts;

(h) injunction to restrain the defendants from disposing their assets;

(i) interest; and

(j) costs.

ENCLOSURES 13, 18 AND 20 — D4, D3 AND D5S' CASE FOR STRIKING OUT

[6] The core of D4, D3 and D5s' contentions are similar and in essence are:

(a) the plaintiffs' claims for money pursuant to the agreements as pleaded are invalid and unenforceable and obviously unsustainable citing the case of *Norihan bt Talib (sued in her personal capacity and trading under the name 'Tanjung Trading') & Ors v Mohd Nasir bin Hassan & Ors (suing on their*

own behalf and for 420 others as per list at 'Appendix A') and another appeal [2018] 3 MLJ 670; [2018] 2 CLJ 66;

(b) the plaintiffs' action is defective;

(c) there is non-compliance of the rules in the joint action filed by the plaintiffs in one single proceeding;

(d) the agreements signed between the plaintiffs and the D1 are separate agreements and the claims are for different amounts;

(e) this court has no jurisdiction to hear the matter as D1 is a company under the jurisdiction of Australian Securities and Investments Commission, not a Malaysian company within the jurisdiction of the Securities Commission Malaysia; the agreements signed by the respective plaintiffs contain a clause where the Seychelles Court had exclusive jurisdiction:

> 6.13 Consent to Exclusive Jurisdiction
>
> Each party hereto consents to the *exclusive jurisdiction of any state or federal court located within the Seychelles* and irrevocably agrees that all actions or proceedings relating to or arising out of this agreement the redeemable shares shall be tried and litigated only in such courts ...

(f) D3, D4 and D5 have no dealing with the plaintiffs; and

(g) although not pleaded and made a ground in the striking out, sought relied on *Lai Soon Onn v Chew Fei Meng and other appeals* [2019] 2 MLJ 96; [2018] 6 MLRA 663 and my decision in *Dato' Shun Leong Kwong v Toh May Fook & Ors* [2021] MLJU 2422 to argue that:

(i) the plaintiffs had no locus standi and right to bring a private civil action against D3, D4 and D5 for breaches of the CMSA; and

(ii) the elements of the tort of conspiracy to defraud and injure the plaintiffs were not pleaded.

THE PLAINTIFFS' CASE IN OPPOSING ENCLS 13, 18 AND 20

[7] In resisting the striking out of the writ and ASOC, the plaintiffs contended:

(a) they are entitled to file a joint action:

(i) O 15 r 4(1) of the ROC 2012 allows the plaintiffs to join all the plaintiffs in one suit without leave of the court if two conditions are fulfilled, namely:

(1) there is a common question of law or fact regarding the investment scheme perpetrated by the defendants; and

(2) the plaintiffs rights to relief in this suit are in respect of or arise out of the same transaction or series of transactions.

(ii) it would be more economical to have one trial; separate trials will carry a risk of different courts arriving at conflicting findings of fact in respect of similar issues;

(iii) by virtue of O 15 r 6(1) of the ROC 2012, this suit shall not be defeated by reason of the misjoinder of parties. Order 15 r 6(1) of the ROC 2012, provides that:

> 6(1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(iv) the fact that the agreements were entered by the plaintiffs and D1 separately and the amounts claimed by each plaintiff are different does not preclude the plaintiffs from jointly bringing this action;

(v) the plaintiffs meet the criteria to commence a representative action under O 15 r 12(1) of the ROC 2012 as the plaintiffs are a class of persons with a common interest and common grievance and further, the relief sought would benefit all the plaintiffs; and

(vi) any omission to state that this is a representative action (which is denied) can be cured by an amendment.

(b) this court has jurisdiction to adjudicate the claim as:

(i) D1 did not apply to strike out based on the exclusive jurisdiction clause, the plaintiffs' claim against D3, D4 and D5 is premised on various causes of action including fraud, misrepresentation, conspiracy, etc. All the agreements were entered and signed by the plaintiffs in Malaysia with D1 to acquire the shares or securities. All the representations were made by the defendants and/or its representatives to the plaintiffs in Malaysia in order to induce the plaintiffs to subscribe and acquire the shares. However, even though all the payments were made by the plaintiffs in Malaysia, the shares have not been issued to the plaintiffs as represented by the defendants. As all events as pleaded by the plaintiffs transpired and took place in Malaysia, clearly the court is clothed with the necessary jurisdiction to hear this matter;

(ii) further, by virtue of s 199 of the CMSA 2007, the plaintiffs are entitled to institute a civil suit to claim for the losses or damages by reason of the defendants having contravened ss 178–179 CMSA. Section 199 of the CMSA 2007 provides that:

199 Civil liability for contravention of section 175, 176, 177, 178, 179 or 181

(1) *A person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened section 175, 176, 177, 178, 179 or 181 may recover the amount of loss or damage by instituting civil proceedings against the other person*, whether or not the other person has been charged with an offence in respect of the contravention or, whether or not a contravention has been proved in a prosecution.

(2) This section shall not affect any liability under any other written law in respect of the conduct constituting the contravention.

(iii) this honourable court is seized of jurisdiction under s 23(1)(a), (b) and (c) of the CJA as the facts giving rise to the cause of action occurred in Malaysia. All the defendants also reside or have their place of business in Malaysia;

(iv) notwithstanding the existence of a foreign jurisdiction clause in the agreements, such a clause cannot operate to preclude a Malaysian Court from exercising the discretion whether or not to hear the case in accordance with the doctrine of forum conveniens — *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 2 MLJ 154 (FC); Malaysia is the appropriate forum to adjudicate the matter as the alleged misrepresentation and/or misleading information were received by the plaintiffs in Malaysia, the agreements were signed in Malaysia, the payments were made by the plaintiffs in Malaysia and all the witnesses are mostly in Malaysia; and

(v) the defendants would suffer no prejudice in having the claim heard in Malaysia.

(c) the different claims has been sufficiently pleaded in the ASOC; and based on the pleadings, the plaintiffs' claim is not an obviously unsustainable claim. Neither can the claim be said to be scandalous, frivolous or vexatious or an abuse of the process of the court within the meaning of O 18 r 19 (b) and (d) of the ROC 2012 as there are clearly issues to be tried in respect of the causes of action pleaded by the plaintiffs, inter alia, as follows:

(i) fraudulent misrepresentation and/or fraud;

(ii) conspiracy to injure/defraud;

(iii) D3, D4 and D5 had deliberately used D1 and D2 as shield and sham companies to defraud the plaintiffs and as such, D3, D4 and D5 are the mastermind and alter-ego of D1 and D2;

(iv) breaches of CMSA 2007; and

(v) money had and received and unjust enrichment.

FINDINGS AND DECISION ON ENCLS 13, 18 AND 20

Is the action obviously unsustainable?

[8] As the striking out applications were made by the D3, D4 and D5 under 'Order 18 r 19(1)(a)(b)(d)' of the ROC 2012 and/or under the inherent powers of the court, I propose to set out O 18 r 19 of the ROC 2012 for convenience:

> 19 Striking out pleadings and endorsements (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) *it discloses no reasonable cause of action or defence, as the case may be*;
>
> (b) *it is scandalous, frivolous or vexatious*;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) *it is otherwise an abuse of the process of the Court*,
>
> and *may* order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
>
> (3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[9] In considering a striking out, the succinct words of the Federal Court are apposite in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1. In a judgment delivered by Ramly Ali FCJ, the Federal Court said:

> [25] The principles for striking out pleadings pursuant to O 18 r 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted when it can clearly be seen that a claim on the face of it is obviously unsustainable (see *Bandar Builder; Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86; *A-G of Duchy of Lancaster v London and North Western Rly Co* [1892] 3 Ch 274).
>
> [26] The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, inter alia, as follows:
>
> (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it '*obviously unsustainable*' (Emphasis added);

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

...

[28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

[29] The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at p 407:

> ... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

[10] In examining the parties' pleadings and assessment of the affidavits, there is guidance in the approach of the Court of Appeal in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75 which was cited with approval by the Federal Court in the *Seruan Gemilang* case — that if there is an issue of fact that is capable of resolution only after taking viva voce evidence during trial, a striking out order should not be made summarily. The same court also stressed that a trial by affidavit ought not to be undertaken, and that a court should not conduct a minute examination of the documents and the facts of the case. The court in that case held that as long as the claim discloses 'some cause of action' or 'raises some question fit to be tried' on the face of it, it ought not to be struck out. The fact that the case is weak and unlikely to succeed is insufficient basis to strike out a claim and reiterated the test for striking out as laid down by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 that it ought to be 'obviously unsustainable'.

[11] Each of encls 13, 18 and 20 are said to be supported by the affidavit of the respective defendants made under 'Order 18 r 19(1)(a), (b), (d)', which meant that the respective supporting affidavits were used even for limb (a) where no affidavit evidence was admissible.

[12] O 18 r 19(2) of the ROC 2012 provides that in considering a striking out application under O 18 r 19(1)(a), the court cannot consider affidavit evidence. The well-established test to be applied is whether on the face of the statement of claim, the court is prepared to conclude that it is patently clear that the cause of action is obviously unsustainable — see the Federal Court's decision in *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226. Further, Ramly Ali J (as His Lordship then was) had aptly stated at para 13 and 15 in *Godrej Sara Lee Ltd v Siah Teong Teck & Anor (Part 1)* [2007] 7 MLJ 153; [2007] 10 CLJ 255:

> [13] An application under O 18 r 19(1)(a) of the RHC 1980 requires a perusal of the pleadings to ascertain whether it does in fact disclose a reasonable 'cause of action'. In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at p 19 the Supreme Court defined 'cause of action' as: ... a statement of facts alleging that a plaintiffs right, either at law or by statute, has in some way or another, been adversely affected or prejudiced by the act of the defendant in an action.
>
> ...
>
> [15] ln the context of O 18 r 19(1)(a) of the RHC 1980, it is useful to remember that in perusing the plaintiff's pleadings the court is looking at the plaintiff who has pleaded his best case to see if those pleadings ought to be struck out.

[13] I have thus ignored the respective supporting affidavits in considering whether the matter ought to be stuck out under limb (a).

[14] Premised on the two Court of Appeal decisions in *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460 and *Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd* [2010] MLJU 576; [2010] 7 CLJ 152, for a cause of action grounded on misrepresentation, the plaintiffs have pleaded the facts to meet the essential elements of:

(a) the false representations of fact;

(b) the said representations induced the plaintiffs to enter into the agreements; and

(c) the essential element of reliance on the defendants representations.

[15] Further:

(a) in paras 117–123 of the ASOC, the plaintiffs have pleaded the particulars of fraud and the investment scheme controlled by D3, D4

and D5 to justify the lifting of the corporate veil of D1 and D2 and to attach personal liability on D3, D4 and D5;

(b) in paras 124–129 of the ASOC, the plaintiffs also pleaded the involvement of D4 in the investment scheme;

(c) in paras 130–134 of the ASOC, the plaintiffs have pleaded the particulars of the conspiracy by the defendants to defraud and injure the plaintiffs; and

(d) in paras 135–144 of the ASOC the plaintiffs have pleaded the various contraventions of the CMSA in relation to the regulated activities and dealing in securities including acquiring and/or subscribing securities which is under the purview of the Security Commission Malaysia.

[16] Having so scrutinised the ASOC filed by the plaintiffs, and given the basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it, must be 'obviously unsustainable', and this court further assumes that the allegations stated in the ASOC are true for the purposes of a striking out application — *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 at p 679, *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607, it is clear to me that the ASOC does prima facie disclose and raise questions of fact and law at least for causes of action against the defendants for misrepresentation, fraud, money had and received, unjust enrichment, breaches of the CMSA and conspiracy to defraud and injure the plaintiffs, entitling relief. Whether the plaintiffs are able to establish and prove such facts is a matter of evidence to be adduced at trial and not to be determined summarily. Plainly, it is not an 'obviously unsustainable' claim.

[17] It is also trite that any allegation of fraud must be dealt with in a full trial and not be resolved by way of the summary process of striking out. The Federal Court in *Seruan Gemilang*, cited the case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321 and observed as follows:

> [34] The case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321 is a good example involving an action to set aside an earlier judgment of a court on ground of fraud, and the court dealt with it in a full trial, but not in a summary striking out process. In that case, the Court of Appeal stressed on the requirement that the allegation of fraud must be established by evidence, and affirmed that whether the test has been met in any given case must depend on the facts and circumstances of the particular case and evidence needs to be adduced during trial.
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> ...
>
> [36] In *Satis Chandra Chatterji and Others v Kumar Satish Kantha Roy And Others* [1923] AIR PC 73 at p 76 (as cited in *Chee Pok Choy*), it was also held that 'Charges of fraud and collusion like those contained in the plaint in this case must, no doubt,

be proved by those who make them — proved by established facts or inferences legitimately drawn from those facts taken together as a whole'. We must add that proof can only be established by way of evidence during trial.

[18] Having found on the face of claim that there is at least one reasonable cause of action, with utmost respect, it is then unnecessary for this court to deal with the other grounds for striking out the action on the basis that the action is allegedly scandalous, frivolous or vexatious or is otherwise an abuse of the process of the court. These grounds are as such, bereft of merit.

[19] For the sake of completeness, I ought to mention that D3, D4 and D5's reliance on *Lai Soon Onn* is misconceived as breach of the CMSA is not the plaintiffs' only cause of action. Likewise, their sweeping reliance on my decision in *Dato' Shun Leong Kwong v Toh May Fook & Ors* [2021] MLJU 2422 does not help them one whit as no specific allegation was made by D3, D4 and D5 on which of the elements of conspiracy had not been made out. It is trite that the four elements to a conspiracy claim — see *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 and *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797; [2016] 3 CLJ 676:

(a) a combination or agreement between two or more individuals;

(b) an intent to injure;

(c) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and

(d) resulting loss and damage to the claimant.

[20] That it is not necessary to show that there was anything in the nature of an express agreement, whether formal or informal was made clear in *Cubic Electronic*:

> [13] The elements required to bring an action for unlawful means conspiracy and lawful means conspiracy are as follows:
>
> A combination or agreement between two or more individuals
>
> It is not necessary to show that there was anything in the nature of an express agreement, whether formal or informal. The court looks at the overt acts of the conspiracy and infers from those acts that there was agreement to further the common object of the combination. It is sufficient that two or more persons combine with the necessary intention or that they deliberately co-operate, albeit tacitly, to achieve a common end (*R v Siracusa* [1990] Cr App R 340). Neither is it necessary that all those involved should have joined the conspiracy at the same time; but all those said to be parties to the conspiracy should be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they are acting in concert. The question in relation to any

A particular scheme or enterprise in which only one or some of the alleged conspirators can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design. (*R v Simmonds* [1969] 1 QB 691).

B It is possible for a conspirator to join later. However, a person is only liable for the damage that is suffered from the time that they join the conspiracy; they are not liable retrospectively for the damage that has been suffered prior to their joining (*O'Keefe v Walsh* [1903] 2 IR 681).

C **[21]** The element of an 'agreement/combination' need not be proven by direct evidence and may be inferred is also made clear by the Court of Appeal in the case of *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493 where Gopal Sri Ram JCA (as His Lordship then was) elucidated at p 515:

D Conspiracy is a tort that is not always capable of proof by direct evidence. Like so many other facts, an agreement to do an unlawful act or a lawful act by unlawful means may be established by evidence of circumstances from which such an agreement may be inferred: *Barindra Kumar Ghose & Ors v The Emperor* (1909) 14 CWN 1114. It is axiomatic that there must be proof and not mere conjecture. In the present case there was sufficient evidence from which a conspiracy could be properly

E inferred. The learned judge was therefore right in drawing the inferences he did.

[22] In refusing a striking out here, what I said in the case of *Pacific & Orient Insurance Co Bhd v Mohammad Hafizi bin Bahari & Anor* [2021] MLJU 642 (upheld by the Court of Appeal on 11 November 2021 in Court of Appeal Civil Appeal No W-02(IM)(NCC)-459–03/2021) is equally applicable here:

F [24] I have not overlooked that learned counsel for the defendants had contended that the claim for conspiracy to defraud is improperly or badly pleaded and not in compliance with the ingredients as stated by the Court of Appeal in *Renault SA*. However, I do not find the defect so remiss as to be fatal and deserving of a striking

G out. My reasons are:

(a) 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirator': see *Renault SA* and *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn*

H *Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437 where Nallini Pathmanathan J (as her Ladyship then was) stated:

I [112] As stated at the outset in relation to the law, the first element that has to be established is the existence of an agreement between the conspirators, namely *Intrared & KFH*, or a combination of action or concerted action between Intrared and another person or persons to injure the plaintiffs (see *Kuwait Oil Tanker Company SAK v Al-Bader and others*). As also stated in that case, it is not necessary to show anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or that they deliberately combine, albeit tacitly to achieve a

common end. How then is this to be ascertained? As stated in R v Siracusa the existence of such an agreement or combination of action with a common purpose *can only be inferred from overt acts*.

[113] This begs the question: are there any overt acts from which it can be inferred that Intrared and KFH acted in concert or combination deliberately so as to achieve a common end, that end being detriment or damage to the plaintiff's economic interests.

(b) In *Deepak Jaikishan's* case*, conspiracy there was inferred from the evidence adduced at trial;*

[23] The case of *Norihan bt Talib (sued in her personal capacity and trading under the name 'Tanjung Trading') & Ors v Mohd Nasir bin Hassan & Ors (suing on their own behalf and for 420 others as per list at 'Appendix A') and another appeal* [2018] 3 MLJ 670; [2018] 2 CLJ 66 cited by the D3, D4 and D5 do not advance their case for striking out at all as the plaintiffs in the said case were held to being in *pari delicto.*

Claim filed in the wrong court?

[24] As for D3, D4 and D5's contention that each plaintiff's claim is subject to the jurisdiction of the magistrate's court or the sessions court as the amount claimed by each plaintiff is less than RM1m, save for the prayers in respect of 'declaration', I am of the view that it serves no useful purpose to remit the claims to the magistrate's or sessions court as the case may be, to avoid the possibility of inconsistent findings by the different courts hearing the matters based on the same facts and both courts' decisions may contradict each other. Letting the suit remain in the High Court would avoid such a potentially embarrassing outcome; particularly when D3, D4 and D5 have not demonstrated that they will suffer any prejudice. Indeed, O 1A of the ROC 2012 exhorts the court or judge to have regard to the overriding interest of justice, to ensure the merits of the case or appeal is heard to attain substantive justice. This ground of objection falls as I fail to see any fundamental irregularity in filing the suit in the High Court that goes to its roots which O 1A and O 2 r 1(3) of the ROC 2012 cannot cure, nor has it caused D3, D4 and D5 a substantial miscarriage of justice.

No jurisdiction?

[25] As for D3, D4 and D5's assertion that the Courts of Seychelles is the proper forum to adjudicate the dispute owing to the exclusive jurisdiction clause in the agreements, I find such submission to be utterly bereft of merit for the following reasons:

(a) firstly, D3, D4 and D5 are not parties to the agreements which contain the exclusive jurisdiction clause; the agreements were signed between

D1 and the respective plaintiffs. *Open Country Dairy Ltd v Able Food Sdn Bhd* [2021] MLJU 969; [2021] 7 CLJ 716 does not assist the D3, D4 and D5 who are not contracting parties to the agreements;

(b) second, even assuming for one moment, D3, D4 and D5 are entitled to rely on the exclusive jurisdiction clause in the agreements, D3, D4 and D5 did not file within the time limited for filing defence, any application pursuant to O 12 r 10(1) and/or (2) of the ROC 2012 to set aside the writ, for a declaration that the court has no jurisdiction over the defendants and/or for a stay of proceedings in the High Court premised on the ground that Malaysia is not the proper forum for the dispute. Again, *Open Country Dairy Limited v Able Food Sdn Bhd* is easily distinguishable as the defendant there in fact filed an application to stay proceedings under O 12 r 10(1) and/or (2) of the ROC 2012. These provisions read:

> Order 12 rule 10 Dispute as to jurisdiction
>
> (1) *A defendant who intends to dispute the jurisdiction of the Court* in the proceedings by reason of any irregularity as is mentioned in rule 9 or on any other ground shall enter an appearance and, *within the time limited for serving a defence, apply to the Court for —*
>
> (a) an order setting aside the writ or service of the writ on him;
>
> (b) an order declaring that the writ has not been duly served on him;
>
> (c)the discharge of any order giving leave to serve the writ on him out of the jurisdiction;
>
> (d) the discharge of any order extending the validity of the writ for the purpose of service;
>
> (e) the protection or release of any property of the defendant seized or threatened with seizure in the proceedings;
>
> (f) the discharge of any order made to prevent any dealing with any property of the defendant;
>
> (g) *a declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action*
>
> (h) such other relief as may be appropriate.
>
> (2) *A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Malaysia is not the proper forum for the dispute shall enter an appearance and, within the time limited for serving a defence, apply to the Court for an order to stay the proceedings.*
>
> (3) An application under paragraph (1) or (2) shall be made by notice of application supported by an affidavit verifying the facts on which the

application is based and a copy of the affidavit shall be served with the notice of application.

(4) Upon the hearing of an application under paragraph (1) or (2), the Court may make such order as it thinks fit and may give such directions for its disposal, as may be appropriate, including directions for the trial thereof as a preliminary issue.

(5) A defendant who makes an application under paragraph (1) shall not be treated as having submitted to the jurisdiction of the Court by reason of his having entered an appearance and if the Court makes no order on the application or dismisses it, paragraph (6) shall apply as if the defendant had not made any such application.

(6) *Except where the defendant makes an application in accordance with paragraph (1), the appearance by a defendant shall, unless the appearance is withdrawn by leave of the Court under Order 21, rule 1, be treated as a submission by the defendant to the jurisdiction of the Court in the proceedings.*

(7) Order 18, rule 2(1) does not apply to any defendant making an application under rule 1, unless the application is dismissed and, in which case, the defendant shall serve his defence within fourteen days after the dismissal of the application or within such other period as the Court may order. (Emphasis added.)

(c) third, sans an application made under O 12 r 10(1) and/or (2) of the ROC 2012 within the time limited, O 12 r 10(6) of the ROC 2012 kicks in — the appearance is treated as 'a submission by the defendant to the jurisdiction of the court in the proceedings.

(d) fourth, not only D3, D4 and D5 but all defendants had irrevocably submitted to this court's jurisdiction — having taken further steps in the proceedings by filing a defence and counterclaim as well as the striking out applications in encl 13, 18 and 20. *Cadit quaestio!* If authority is needed, the Court of Appeal in *Kebabangan Petroleum Operating Co Sdn Bhd v Mikuni (M) Sdn Bhd & Ors* [2021] 1 MLJ 693, in a judgment delivered by Suraya Othman JCA held at [36], [38] and [41], that the filing of an application to strike out constitutes a step in the proceedings and evidences an unequivocal intention to submit to the jurisdiction of the court to adjudicate on the dispute, therefore the applicant was not entitled to a stay of proceedings to arbitrate the matter. Although the *Kebabangan Petroleum* case concerns an application for a stay pending arbitration, the same court in *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322 explained 'there is really no difference in principle between cases where an application to stay an action is made on the ground that there is an exclusive jurisdiction clause and those cases where a stay is sought upon the ground that there is in existence an agreement to refer disputes to arbitration';

(e) fifth, the Federal Court case of *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 2 MLJ 154 made clear that, notwithstanding a foreign jurisdiction clause, a Malaysian court could not be ousted simpliciter from exercising the discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case or not:

(i) in determining whether the High Court Malaya has jurisdiction over D3, D4 and D5, the allegations of the plaintiffs in the statement of claim must be assumed to be true. There should not be a trial on the affidavits. In *Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424, the Court of Appeal held, in respect to an application to discharge an order granting leave for service out of jurisdiction:

> [17] So too here. The merits of the plaintiffs' claim that there was publication are yet to be tried. The mere ipse dixit of the defendant that there was no publication cannot be determinative of the matter. At the risk of repetition, it needs to be said that at the point of determining whether the tort of defamation was committed within the jurisdiction, *all the allegations in the statement of claim must be presumed to be true. At that stage there is no preliminary inquiry through a trial on affidavits as to whether the defamatory material was indeed published within the jurisdiction. Were it otherwise, there is a risk that applications to discharge an order granting leave under O 11 r 1 may turn out to be mini trials without determining the suit on its merits.* (Emphasis added.)

(ii) the decision in *Matchplan* was affirmed by the Federal Court in *Joseph bin Paulus Lantip & Ors v Unilever Plc* [2018] supp MLJ 151:

> [42] *From the authorities, it is clear that there should not be a trial on the affidavits in determining whether the plaintiff has established a good arguable case. As stated by Gopal Sri Ram JCA in Matchplan (M) Sdn Bhd & Anor for the purpose of determining whether High Court at Kuala Lumpur has jurisdiction over the defendants, the allegations of the plaintiffs in the statement of claim must be assumed to be true.* The application for leave under O 11 r 4 of the RHC should not be turned into a mini trial. Hence, the primary consideration at the leave stage is whether or not the court should grant leave to issue the writ out of jurisdiction, not so much on the merits of the case.'

(iii) Gopal Sri Ram JCA (as His Lordship then was) in *Matchplan* explained:

> 8 Third, jurisdiction over the cause of action. *The jurisdiction of the High Court over a cause of action rests on the twin pillars of effectiveness and submission. Effectiveness means that any judgment of the court in the given dispute can be enforced. Submission refers to a defendant submitting*

to the jurisdiction of the court. Absent either of these, the court cannot seise itself of the cause of action. In Malaysia, the High Court is seised of jurisdiction over a dispute in any of the following three cases:

(i) where the defendant is served with the writ or other originating process within the jurisdiction; or

(ii) where any of the conditions set out in s 23 of the Courts of Judicature Act 1964 ('the CJA') are satisfied; or

(iii) where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court pursuant to O 11 of the RHC.

10 *It is now settled by binding authority that the High Court may exercise jurisdiction over a non-resident defendant pursuant to s 23(1) of the CJA* (see *Malayan Banking Berhad v International Tin Council and another appeal* [1989] 3 MLJ 286). The relevant part of the section reads as follows:

23(1) Subject to the limitations contained in Article 128 of the Constitution every High Court shall have jurisdiction to try all civil proceedings where —

(a) *the cause of action arose*, or

(b) *the defendant or one of several defendants resides or has his place of business*, or

(c) *the facts on which the proceedings are based exist or are alleged to have occurred*, or

(d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court ...

11. In *Malayan Banking Berhad v International Tin Council*, it was held (per Mohd Azmi SCJ) that in Malaysia service is not solely the foundation of jurisdiction of the High Court and that apart from O 11 r 1, s 23(1)(b) of the CJA confers extra-territorial jurisdiction on the High Court in cases falling within the section. In that case, the facts fell within s 23(1)(b). In the present case, the relevant provisions are both paras (b) and (c) of s 23(1). In other words, for the appellants to succeed in the instant appeal they must show one of two things. Either that the tort of libel of which they complain was committed within the jurisdiction. Or, that the facts on which their action in tort is based are alleged to have occurred within the High Court's jurisdiction. If they demonstrate either of these things, then they would exdebito justitae entitled to have their writ served pursuant to O 11 r 1 of the RHC. *Once the court is seised of extra territorial jurisdiction by virtue of s 23(1), O 11 r 1 ceases to be of jurisdictional relevance.* The decision in *Malayan Banking Bhd v International Tin Council* makes it plain that O 11 r 1 assumes jurisdictional importance only in cases falling outside the scope of s 23(1). Accordingly, in cases where s 23(1) applies, O 11 r 1

becomes a mere procedural formality to enable a plaintiff to effect service abroad.

(iv) the Federal Court in *Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor* [2014] 6 MLJ 189; [2014] 1 CLJ 18 and *Goodness For Import And Export v Phillip Morris Brands Sarl* [2016] 5 MLJ 171; [2016] 7 CLJ 303 cited *Matchplan* with approval.

(v) *Matchplan* also said that there under s 23(1)(c) CJA, there is no burden on the plaintiffs to prove to a conviction that the facts on which their action is based exist within the jurisdiction of the High Court. It is enough if those facts are alleged to have occurred within the court's jurisdiction:

> That brings you to s 23(1)(c) of the Courts of Judicature Act. That provision has already been referred to earlier in this judgment. Under this section there is no burden on the plaintiffs to prove to a conviction that the facts on which their action is based (that is to say the action for defamation) exist within the jurisdiction of the High Court. It is enough if those facts are alleged to have occurred within the court's jurisdiction. That is what the latter part of s 23(1)(c) says. Nothing more; nothing less. Consequently, the plaintiffs are under no duty to adduce positive evidence, as suggested by learned counsel for the defendants, to disprove the defendants' contention that there was no publication. The plaintiffs have alleged that the defamatory statement was published to two persons within the jurisdiction. That is sufficient to bring them within the purview of s 23(1)(c).

(vi) assuming in the present case that the plaintiffs' averments of the factual matrix are true that the agreements were made and signed by all the parties in Malaysia; that D3, D4 and D5 made the misrepresentations to the plaintiffs in Malaysia in order to induce the plaintiffs to sign the agreement to purchase the shares, the defendants have an address in Malaysia, D2 is a registered company in Malaysia and D3, D4 and D5 are Malaysians, all plaintiffs except the sixth plaintiff are Malaysians and residing in Malaysia, the total sum of RM1,309,900 was paid to D2's bank account in Malaysia, the plaintiffs suffered the loss in Malaysia, the evidence and witnesses who will give evidence are in Malaysia and within the jurisdiction of this court rather than in Seychelles, the plaintiffs' causes of action arose in Malaysia, I hold that this action falls within the ambit under s 23(1)(a), (b and (c) of the CJA — that Malaysia is better suited to try the dispute and that the High Court of Malaya has jurisdiction to try this action.; and

(vii) having already submitted to the jurisdiction of the Malaysian Court as I have found earlier, D3, D4 and D5's objection to the

jurisdiction of this court is a non-starter. A

Misjoinder?

[26] O 15 r 4(1)(a) of the ROC 2012 provides: B

> Joinder of parties (O 15 r 4)
>
> (1) Subject to rule 5(1), *two or more persons may be joined together in one action as plaintiffs* or as defendants with the leave of the Court or where —
>
> (a) *if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions* and C
>
> (b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.

D

[27] In this action, notwithstanding that all six plaintiffs entered into separate agreements, and the mounts claimed by each plaintiff differed, it is however abundantly clear to me that there are common questions of law and fact as gleaned from the pleading: E

(a) at paras 15–106 of the ASOC, each plaintiff has pleaded the particulars of a series of transaction between the plaintiffs and defendants in respect of the events leading to the subscription of the shares, and the payments by the plaintiffs for the purchase of the shares by relying on the representations and inducement by the defendants; F

(b) at paras 107–116 of the ASOC, the plaintiffs have pleaded the particulars of the misrepresentation by the defendants;

(c) at paras 117–123 of the ASOC, the plaintiffs have pleaded the particulars of fraud and the investment scheme controlled by D3, D4 and D5 to justify the lifting of the corporate veil of D1 and D2, and to make D3, D4 and D5 personally liable; G

(d) at paras 124–129 of the ASOC, the plaintiffs pleaded D4's involvement in the investment scheme; H

(e) at paras 130–134 of the ASOC, the plaintiffs have pleaded the particulars of the conspiracy by the defendants to defraud and injure the plaintiffs;

(f) at paras 135–144 of the ASOC, the several breaches of the CMSA were pleaded; I

(g) all plaintiffs claimed that the convertible notes purchase agreements are void and illegal; and

(h) all plaintiffs also claimed for restitution of the money paid to D2, for money had and received by D2, and for unjust enrichment.

[28] A case produced by the plaintiffs' counsel nailed the point, which I gratefully adopt. In *Lembaga Arkitek Malaysia v Cheah Kim Fah & Ors* [1999] 1 MLJ 669, the Court of Appeal said at p 680:

> The learned trial judge added that it must be emphasized that the joinder of plaintiffs or defendants is subject to two conditions namely that the right of relief must in each case be in respect of or arise out of the same transaction or series of transactions, and there must be some common question of law or fact.
>
> He concluded that it is abundantly clear that *the respondents, who are the plaintiffs in this particular instance, did share a common question of law as to the reliefs claimed by them, mainly for a declaration that they are entitled to submit plans to the local authorities from whom they had obtained the relevant approvals, which have so far been denied to them over a period of time by the appellant, the defendant in the court below. It would from the evidence, he held, fall within the purview of a series of transactions for the purposes of O 15 r 4(1)(b) of the Rules.* Even if he was held to be wrong on the law in respect of O 15 r 4 of the Rules, he added, *O 15 r 6 of the Rules explicitly states that no suit shall be defeated by reason of a misjoinder*. We were in no position to disagree with the learned trial judge on this issue and similarly hold that *the issue of misjoinder raised by the appellant here is completely without basis*. (Emphasis added.)

[29] There being common questions of law and fact, I hold that the plaintiffs are absolutely entitled to join in one suit pursuant to O 15 r 4. In addition, O 15 r 6(1) of the ROC 2012 makes clear that the action shall not be defeated by reason of the misjoinder of parties. The utility of a joinder of the parties cannot be underscored enough — to save precious time of not having separate trials which may culminate in the wholly unacceptable risk that different courts may arrive at conflicting findings of fact and decision premised on the same issues. In addition, the plaintiffs in my respectful view, also meet the criteria to under O 15 r 12(1) to bring a representative action as the plaintiffs are a class of persons with common interest and common grievance and the relief sought will be beneficial to all of them. The fact that the amounts due to each of the plaintiffs and the agreements are signed on different dates do not bar a representative action — see *Maju Puncakbumi Sdn Bhd v Ch'Ng Han Keong* [2019] MLJU 1290. I therefore accept the plaintiffs' counsel's submission on this point. Any defect, whether misdescription or non-description in the intitulement can be easily rectified by way of an amendment.

[30] It is to be noted that the first two prayers in the ASOC are for declarations. On the wide powers of the court to grant declaratory reliefs, I would like to refer to the Court of Appeal's judgment in *Dato' Raja Ideris bin Raja Ahmad & Ors v Teng Chang Khim (Chairman of the Select Committee on Competence, Accountability and Transparency and the Chairman of the*

Committee of Rights and Privileges State Legislative Assembly of Selangor) & Ors [2012] 5 MLJ 490 at pp 498 and 499–500, delivered by Low Hop Bing JCA as follows:

> [25] The question raised in the aforesaid submissions may be formulated as follows:
>
> > Upon a true construction of s 41 of the [SRA] and O 15 r 16, *where the OS prays for a declaratory judgment in the form of declarations, is it proper to strike out the OS on the ground that it discloses no reasonable cause of action?*
>
> [28] A declaratory judgment merely states the rights or legal position of the parties as they stand without altering them in any way: see *Gan Hwa Kian & Anor v Shencourt Sdn Bhd* [2007] 4 MLJ 554. A declaration can be used to ascertain and determine the legal rights of parties or to determine a point of law: *Brett Andrew Macnamara v Kam Lee Kuan* [2008] 2 MLJ 450 at p 459 per Balia Yusof J (now JCA). *By virtue of s 41 and O 15 r 16, the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. The court has power to grant a declaration irrespective of whether an application has a cause of action or not and even if a cause of action does not exist at the time of the filing of an application*: see eg *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener)* [1995] 2 MLJ 421; *BSN Commercial Bank (M) Bhd v Pentadbir Tanah Daerah, Mersing* [1997] 5 MLJ 288 and *Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd* [2006] 4 MLJ 284 at p 294, per Abdul Malik Ishak J (now JCA).
>
> [29] *The jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action*: *Guaranty Trust Co of New York v Hannay* [1915] 2 KB 536 (CA) (Eng); *Dewan Singh v M Thynappa Ltd & Yeo Teck Chiang* [1939] MLJ 278; *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 (FC); *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 and *Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110. Our answer to the question set out in para [25] is in the negative.
>
> CONCLUSION
>
> [30] Based on the foregoing grounds, we allow this appeal, *set aside the striking out order of the High Court and substitute it with an order that the OS be reinstated and remitted to the High Court* and, with the utmost respect, to be heard and disposed of on merits before another judge. (Emphasis added.)

[31] Based on the above case alone, I am not at this stage of the striking out proceedings, prepared to make any finding of facts and will desist from expressing any views in respect of the strength or weakness of the plaintiffs' claim. All that is needed is one triable issue for the matter to proceed to trial. Suffice to say plainly nonetheless, the ends of justice will not be achieved if the court's doors are slammed in the plaintiffs' face at this stage. I am not prepared to rule at this stage that the plaintiff's claim is bound to fail, is obviously unsustainable or wholly devoid of merit.

[32] It is trite that the discretionary power to strike out a claim is to be 'sparingly exercised' according to the justice of the case. I am of the firm view that striking out the claim in the particular circumstances of this case would be unwarranted. In support, I produce the observations of the appellate courts in just two cases.

[33] The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347; [1985] 1 CLJ 235; [1985] CLJ Rep 45, Seah FCJ exhorted:

> *The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power.* It should be exercised with the utmost caution [per Lord Diplock in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1. In *Lawrance v Norreys* (1890) 15 App Cas 210, 219 Lord Herschell said words to the same effect that 'It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. *It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases*. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved'. (Emphasis added.)

[34] The Court of Appeal in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2012] 1 LNS 817 in a judgment delivered by Ramly Ali JCA (as His Lordship then was) made the following observations:

> [24] Some judges described the power to strike out the plaintiff's claim as *'draconian' — in the sense that the plaintiff is being deprived completely from having his day in the court of law to establish his claim by adducing evidence and calling of witnesses. If not properly exercised, the court in effect is closing its door for the plaintiff to have his recourse to justice. If the application by the defendant is dismissed, the case will still go for trial* and the *defendant will still have his second bite of the cherry during trial.* On the other hand, *if the application is allowed and the case is struck out (as in the present case before us) the plaintiff will obviously lose everything, particularly when the plaintiff cannot refile the claim because of limitation issue.*
>
> ...
>
> [26] *Striking out applications under O 18 r 19(1) of the RHC should not be taken lightly by judges.* No doubt, the application is recorded as an 'interlocutory matter' in the court dockets, but the effect of the striking out is far more serious and drastic compared to the decision after full trial. In full-trial cases, the plaintiff is given full chance and opportunity to establish and prove his claim before the court of law. However, in striking out proceedings, his claim is struck out even before he has the chance and opportunity to prove his case. (Emphasis added.)

[35] With the greatest of respect to D3, D4 and D5's counsel, this court is not satisfied and cannot with confidence conclude on the facts of this case, that there is no reasonable cause of action or that the claim is conspicuously hopeless or baseless, or without foundation in law or in equity and as such

doomed to fail, or an abuse of court process. The dispute of facts raised, inter alia, whether D3, D4 and D5 had any dealings at all with the plaintiffs is capable of resolution only after taking viva voce evidence during trial. The issues raised in my view, require mature consideration.

[36] It cannot be gainsaid that the court at this interlocutory stage, is not concerned with the merits of the claim. However weak the case, it is not a good ground for striking out the claim. In *Bandar Builder*, Mohamed Dzaiddin SCJ (later Chief Justice of Malaysia) delivering judgment of the Supreme Court aptly reminded at pp 43–44:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. If is only in plain and obvious cases that recourse should be had to the summary process under this rule ... and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' ...
>
> ...
>
> This court as well as the court below is not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, *the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck ou*t (see *Moore v Lawson and Wenlock v Moloney & Ors*). (Emphasis added.)

[37] For the reasons given, I find that the action is eminently unsuitable to be summarily struck out under O 18 r 19(1)(a), or (b), or (d) as justice will, in my view be better served in allowing the plaintiffs to have their day in court. I therefore exercised my discretion to dismiss encls 13, 18 and 20 with costs subject to allocator.

ENCLOSURE 10

[38] Enclosure 10 is the plaintiffs' application to strike out the defendants counterclaim under O 18 r 19(1)(a) or (b) or (d) of the ROC 2012 and the inherent power of the court on the following grounds:

(a) the defendants' counterclaim does not disclose a reasonable cause, is frivolous and constitute an abuse of the court's proses; and

(b) the defendants had failed to meet the pre-requisite for establishing a cause of action for 'malicious prosecution'. Thus, it is premature for the defendants to counterclaim against the plaintiffs.

[39] The defendants' counterclaim reads:

> 103. Melalui seperti diatas, Defendan-defendan memplidkan bahawa Plaintif-plaintif telah menfailkan saman ini dengan niat jahat dan dengan motif tersembunyi terhadap Defendan-defendan. Akibat daripada saman niat jahat tersebut, Defendan-defendan telah mengalmi kerugian dan kerosakan.
>
> 104. D3, D4 dan D5 telah dari semasa ke semasa mengalami kemudaratan dan penderitaan berupa tekanan (stress) akibat saman niat jahat yang difailkan oleh Plaintif-plaintif disini.
>
> 105. Selanjutnya, Defendan-defendan juga terpaksa menanggung kos guaman untuk mendapatkan kepakaran dan nasihat guaman mengenai saman niat jahat yang difailkan oleh Plaintif-plaintif disini. Selain itu, D1 dan D2 juga telah mengalami kemerosotan perniagaan dan pelaburan akibat daripada tindakan saman niat jahat yang difailkan oleh Plaintif-plaintif di sini.
>
> 106. Oleh itu, Defendan-Defendan menuntut terhadap Plaintif-Plaintif:-
>
> a) Gantirugi sebanyak Ringgit Malaysia Sepuluh Juta (RM10,000,000) kerana saman niat jahat yang difailkan oleh Plaintif-Plaintif di sini.
>
> b) Gantirugi Am (General Damages);
>
> c) Gantirugi Teruk (Aggravated Damages);
>
> d) Gantirugi Teladan (Exemplary damages);
>
> e) Kos tindakan ini atas dasar penguamcara dan anak guam; dan
>
> f) Relif-relif lain atau selanjutnya yang difikirkan suaimanfaat dan wajar oleh Mahkamah yang Mulia ini.

[40] It is apparent that the defendants' counterclaim is predicated on malicious prosecution.

[41] In countering the application, the defendants' counsel merely postulated trite principles on the law of striking out.

[42] In *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259, Mahadev Shankar J (as His Lordship then was) explained the tort of malicious prosecution as follows at p 274:

> There is a well-established tort known as the tort of malicious prosecution. Its essential ingredients are conveniently set out in a passage in 45 *Halsbury Laws* (4th Ed) para 1368, which sets out the matters which have to be pleaded to establish a tort of this nature:
>
> A plaintiff must expressly state in his statement of claim: (1) the previous proceedings instituted by the defendant of which he complains; (2) that in so far as they were capable of doing so they terminated in his favour; (3) that there was no reasonable and probable cause for the defendant instituting or carrying on those

proceedings; (4) that the defendant was actuated by malice; and (5) that he had suffered damage.' A

[43] At p 268 of the judgment, Mahadev Shankar J (as His Lordship then was) said: B

> Paragraph 5 of the claim, as it is worded, is clearly a pleading of malicious prosecution (see *Precedent 412* in Bullen & Leake (13th Ed) p 645). No particulars are given of the malice and lack of reasonable and probable cause and the plea should be struck out on this ground alone. However, on the basis that this was not fatal, there was another reason why it could not get off the ground. C
>
> *The claim for malicious prosecution against the defendants could not succeed because the action was manifestly premature*. Dato' Harun Idris referred me to the relevant passages in JP Aggarwala's *Pleadings in India* 1 [1990] pp 128, 129 paras 103, 104 and also at p 131 and the privy council in *Balbhaddar Singh v Badri Shah* (1926) AIR 46; *B Madan Mohan Singh v B Ram Sunder Singh* (1930) AIR 326 and also *Taib bin Awang v Mohamed bin Abdullah & Ors* [1983] 2 MLJ 413. *I agree that it was not open to the developer to launch a claim for malicious prosecution until the proceedings in the motion had been finally resolved.* That could only be when the appeal had been concluded. D

E

[44] Here, it is obvious that the proceedings instituted herein has not terminated in the defendants' favour; neither was there any particulars given of lack of probable cause. Particulars of malice was also not pleaded contrary to O 18 r 12(1) of the ROC 2012 which reads: F

> 12 Particulars of pleading (O 18 r 12)
>
> (1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words — G
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or *any malice*, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies. H

[45] In *Gasing Heights*, it was held that since no particulars were given of the malice and the lack of reasonable and probable cause, the plea of malicious prosecution should be struck out on this ground alone. I

[46] Here, the counterclaim is also premature as the proceedings herein have not terminated in the defendants' favour. Plainly, the counterclaim is obviously unsustainable.

[47] Not only that. Pursuant to the O 18 r 12(1A) of the ROC 2012, general damages must not be quantified in the statement of claim (in this case the counterclaim) and it is for the court to determine the quantum of damages. The defendants here have claimed for damages against the plaintiffs the sum of RM10m. I can be forgiven if I make an inevitable objective inference that the counterclaim is filed for a collateral purpose — to intimidate the plaintiffs and extort a relief which the defendants are not entitled to. That is abuse of process simpliciter.

[48] Gopal Sri Ram JCA (as His Lordship then was) in the case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425 at pp 434–435; [1998] 2 CLJ 340 at p 352 said this in regard to the doctrine of abuse of process:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

[49] When abuse of court process is revealed, the court has a duty, not a discretion, to dismiss the action: *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, per Lord Diplock at 536D.

[50] I think justice demands that the counterclaim should be struck out. The counterclaim cannot succeed — it is obviously unsustainable for the reasons given. Neither in my respectful view should the plaintiffs be put through the costly process of a full trial on the counterclaim, nor should the court's invaluable time be wasted on the counterclaim in the circumstances as obtained here.

[51] Accordingly, encl 10 is allowed with costs subject to allocator.

ENCLOSURE 11

[52] Enclosure 11 is the plaintiffs' application for, inter alia, a freezing order and/or an injunction order in the nature of Mareva injunction order against the defendants pursuant to s 360(1)(d)(D) of the CMSA and/or O 29 of the ROC 2012 and/or s 25 of the Courts of Judicature Act 1964 and/or inherent jurisdiction of the ourt.

Freezing order pursuant to s 360(1)(d)(D) of the CMSA

[53] Section 360(1)(d)(D) and s 360(2) of the CMSA reads:

(1) Where —

(a) on an application by the Commission, it appears to the court that —

(i) there is reasonable likelihood that any person will contravene a relevant requirement;

(ii) any person has contravened a relevant requirement; or

(iii) any person has contravened a relevant requirement and that there are steps which could be taken to remedy the contravention or to mitigate the effect of such contravention, including making restitution to any other person aggrieved by such contravention.

(b) on an application by the Commission, it appears to the Court that any person has failed or is failing to comply with any direction issued by the Commission under section 354, 355 or 356

(c) on an application by an exchange holding company ...

(i) ...; or

(d) on an application by any person aggrieved by an alleged contravention by another person of a relevant requirement, it appears to the court that —

(i) the other person has contravened the relevant requirement; and

(ii) the Applicant is aggrieved by the contravention,

the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, *make one or more of the following orders*:

(A) an order restraining or requiring the cessation of the contravention;

(B) an order restraining a person from dealing in securities or trading in futures contracts in respect of any class of securities or futures contracts mentioned in the order;

(C) an order declaring a futures contract to be void or voidable;

(D) *an order restraining the person from acquiring, disposing of or otherwise dealing with, assets which the court is satisfied such person is reasonably likely to dispose of or otherwise deal with*

(E) ...;

(F) ...;

(G) ...;

(H) ...;

(I) ...;

(J) ...;

(K) ...;

(L) ...;

(M) ...;

(N) ...;

(O) ...; and

(P) *Any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding provisions of this subsection*.

(2) If an application is made to a court for an order under subsection (1), the Court may, if in its opinion it is desirable to do so, before considering the application, *make an interim order of the kind applied for and such order shall be expressed to have effect pending the determination of the application.*

[54] In support of its application under ss 360(1)(d)(D), the plaintiffs submitted that:

(a) the freezing order is sought for the purpose of preservation of the assets of the defendants or status quo pending the final determination of the suit, citing in support *Securities Commission v Ishak bin Ismail* [2010] MLJU 1194

(b) the use of the word 'appears' in s 360(1)(d), indicates a lower standard of proof as held by the Court of Appeal in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158; [2012] 8 CLJ 678 at [44];

(c) the plaintiffs do not need to show evidence of a real risk of dissipation of assets — *Securities Commission v Ishak bin Ismail* [2010] MLJU 1194 (HC);

(d) the plaintiffs are 'persons aggrieved' by the alleged contravention by the defendants of the relevant requirement — *Apft Bhd v Dato' Faruk bin Othman* [2018] MLJU 1471 (HC);

(e) there are numerous contraventions of the CMSA including s 58(1), ss 178, 179 the defendants are not licensed to carry on business of a regulated activity; by dint of s 199 of the CMSA, the plaintiffs are entitled to institute a civil suit to claim for the losses or damages;

(f) even if D1 is formed or carrying on business outside Malaysia. Section 174 of CMSA 2007 applies — see *Securities Commission v Lee Kee Sien, Albert and Others* [2009] MLJU 117 where the High Court allowed the Mareva injunction application filed by the SC; similarly in *Securities Commission Malaysia v Wong Shee Kai & Ors (Bright Packaging Industry Bhd, proposed intervener)* [2021] MLJU 324, there was a contravention of s 179 of the CMSA by the defendants and the High Court allowed a Mareva injunction application to freeze the defendants' assets pursuant to s 360 of the CMSA. In both *Securities Commission v Ishak bin Ismail* [2010] MLJU 1194 and *Apft Bhd v Dato' Faruk bin Othman* [2018] MLJU 1471, the court allowed the application for

Freezing Order pursuant to s 360 of the CMSA due to contravention of the CMSA. A

[55] On this aspect of the case, the defendants argued that:

(a) the plaintiffs in the instance case are individuals applying for the freezing order under s 360 of the CMSA for their personal benefit and not the regulatory body — see *Securities Commission v Ishak bin Ismail* [2010] MLJU 1194; and B

(b) the plaintiff failed to show solid evidence that there exists a risk of dissipation of assets by the defendants in the instant case. C

[56] In considering the parties' arguments, I have borne in mind that:

(a) the plaintiffs have not pleaded that any complaint was made to the Securities Commission (SC); and D

(b) neither did the plaintiffs plead that the alleged contravention of the securities law has been determined by the SC.

[57] The principles encapsulated in the following cases make plain that until the SC has determined there is any contravention of the relevant statutory provisions, the plaintiffs' claim based on breaches of the CMSA fail *in limine* as it is not the court's function to usurp the role of the regulators: E

(a) in *Tuan Hj Zulkifli bin Hj Hussain & Ors v IOI Corp Bhd & Ors* [2012] 7 MLJ 215 at p 245, Nallini Pathnamanthan J (now FCJ) exhaustively referred to various cases and held that the civil court does not have the power to make an order concerning violation of CMSA provision arising from gaining control, neither does the court have any power to compel a party to make the MGO. In the case, the defendant triggered the MGO requirement. The plaintiff filed an action for breach of statutory duty, in respect of the failure to make a MGO. At paras 75 and 76, Her Ladyship held that breach of the Code did not give rise to a private law cause of action; F G

(b) in *Shahidan bin Shafie v Atlan Holdings Sdn Bhd & Anor* [2015] MLJU 1944; [2017] 4 CLJ 587 at pp 598–599, the Court of Appeal dealt with a similar issue of a plaintiff suing in the civil court for an order to compel the defendants to make a Mandatory Take-Over Offer as per the terms set out in the Securities Commission Act 1983 and the Take-Over Code, and decided that any breach of the Securities Commission Act does not give rise to a private cause of action unless there was a ruling by the SC. It was held by the Court of Appeal that: H I

> [21] *Breach of statutory duty per se does not give rise to a private law cause of action*. It is best explained by the learned authors in *Tort Law* (3rd Ed) by

Nicholas J MacBride and Roderick Bagshaw where they lucidly put it this way:

> By definition the breach of a statutory duty that is owed to no one in particular cannot amount to a tort. But even the breach of a statutory duty that is owed to another will usually not amount to a tort. The breach of a statutory duty that is owed to another will only amount to a tort if when Parliament created that duty it intended that breach of that duty should be treated as a tort by the courts and therefore that all the remedies that are normally available when someone has committed a tort should apply to the breach of that statutory duty. As this is a bit of a mouthful, let's just say that *the breach of a statutory duty owed to another will only amount to a tort if Parliament intended, when it created that duty, that breach of that duty should be 'actionable in tort.*
>
> ...
>
> [26] It is our view that premised on the aforesaid provisions, it can be said that it is the intention of Parliament for the Securities Commission to be tasked to supervise, regulate, issue rulings from time to time and enforce the pr actices of companies bound by the SC Act 1993 and the Take -Over Code. The learned Judge in the High Court in fact found that the only remedy available to the plaintiff was to complain to the Securities Commission about the conduct of the defendants and i f the Securities Commission failed to act or makes a ruling unfavourable to the plaintiff, his only option was to apply to the court for judicial review of the decision of the Securities Commission. In short, the plaintiff's remedy was one of public law.
>
> ...
>
> [28] As we have intimated earlier, in construing s 153 we must take into consideration of other provisions in the SC Act to discern the context. Hence in doing so, *we agree with learned counsel for the defendants that the plaintiff's right to sue can only exist when the Securities Commission had made a ruling. In the case before us, the Securities Commission must first make a ruling that the defendants had acquired control of Naluri in the context of the relevant law and was required to make the mandatory take-over offer to the shareholders of the Naluri.* From the record of Appeal, it is undisputed that the Securities Commission was aware of the allegation of the defendants having 'acquired control' of Naluri and had sought clarification from the Board of Directors of Naluri. The Securities Commission after considering Naluri's clarification took no further action. As intimated above, the plaintiff should have sought a review of the Securities Commission decision in Court. This he did not do.
>
> [29] If we were to adopt the interpretation of section 153 SC Act of the plaintiff, it would amount to the Court stepping into the shoes of the Securities Commission which is tasked to supervise and regulate the conduct of companies. As we have said earlier, that is not and cannot be the intention of Parliament. Our interpretation reconciles section 153

with the other provisions in the SC Act and that is *the private cause of action for breach of statutory duty is preserved to the extent only after the Securities Commission has made a specific ruling*. This would avoid a situation where there would be two decisions, one of the Court and the other the Securities Commission. This scenario would bring uncertainty to the business world which must be avoided. *Our interpretation allows only one decision at one time and that is the decision of the Securities Commission until the same is either set aside or substituted by the Courts.*

(c) two years later, the Court of Appeal examined the same issue in *Lai Soon Onn v Chew Fei Meng and other appeals* [2019] 2 MLJ 96; [2018] 6 MLRA 663. In *Lai Soon Onn*, the suit was struck out by the High Court. In affirming the High Court decision (reported as *Lai Soon Onn v Tan Tian Sin & Ors* [2017] 11 MLJ 476) and dismissing the plaintiff's appeal, the Court of Appeal, inter alia, held:

[42] Similarly, *it is not for the courts to usurp the function of the market regulatory bodies in carrying out its objective as stipulated under the law. The functions of the SC are statutorily provided in s 15(1)(d) of the SCA, where it is tasked to regulate the take-over and mergers of companies*. Section 217(4) of the CMSA provides that:

The Commission shall administer the Code and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code and without limiting the generality of the foregoing —

(d) issue rulings —

(i) to interpret this Division and the Code;

(ii) on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take- over, merger or compulsory acquisition; and

(e) enquire into any matter relating to any take over offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission thinks fit with respect thereto.

[43] *Gleaning through the provisions of the CMSA, it is the intention of the Act that the bodies established under the Act are regulatory bodies and it is not the function of the court to usurp their function nor to second guess their decisions.* In R *v International Stock Exchange of UK and Ireland, ex parte Else Ltd*; *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else* (1982) Ltd and another; *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Roberts* [1993] 1 All ER 420; [1993] QB 534, Lord Bingham observed that 'the court will not second guess the informed judgment of responsible regulators steeped in knowledge of their particular market'. *This court applied the same principle in Shahidan bin Shafie in arriving at its decision when interpreting s 153 of the*

SCA. To interpret otherwise would result in a situation where there would be two decisions, one of the court and the other from the SC. That cannot be the position in law (refer to para 29 of *Shahidan bin Shafie*). *The courts have shown a reluctance to interfere with the decision of regulatory bodies in carrying out its objective in the absence of mala fide or acting in excess of jurisdiction*. A similar stance was taken by this court in *Bursa Malaysia Securities Berhad* and also in *Khiudin bin Mohd & Anor v Bursa Malaysia Securities Bhd and another application* [2012] 6 MLJ 131 which had referred to various commonwealth jurisdictions, which demonstrated the attitude of the courts in reviewing the decision made by the regulators in different jurisdictions. *Therefore, it is not within this court's jurisdiction to interfere with the duties mandated to the market regulatory bodies in maintaining and promoting the interests of the public in dealing on the exchange and these bodies should be left to carry out its objective as stipulated under the Act*.

...

[55] Therefore, guided by the principle of construction in the above case, as the word 'requirement' is not found in ss 217–220 of the CMSA, it must therefore follow that *it was never the intention of Parliament when it legislated s 360 of the CMSA to confer on the plaintiff a right to apply to court to compel the defendants to undertake an MGO. This is fortified further if one is to examine the provisions of Division 2 of Part VI of the CMSA (comprising of ss 217–220). This is in pari materia with Division 2 Part IV of the SCA (comprising of ss 33–34C)*

[56] *Division 2 Part VI of the CMSA does not provide for any right of a dissenting shareholder to apply to the courts for an order to compel the defendants to undertake a MGO*. These rights of the minority shareholders are provided for under s 223 and 224 of the CMSA, however the provisions do not provide for a private right to enforce the Take-Over Code. *If Parliament intended for a private right to enforce the Take-Over Code, it would have been provided for in either ss 223 or 224 or in any of the provisions in Division 2 of Part VI of the CMSA*.

...

[60] *Therefore, it is our conclusion that it was never the intention of the legislature that s 360 of the CMSA is to confer a private right to compel the defendants to undertake a MGO* ... (Emphasis added.)

(a) the courts take the same view if the regulator is the Bursa Malaysia. In *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695; [2009] 5 CLJ 698 adopting *R v Securities and Futures Authority ex p Panton* (unreported 20 June 1994), the Court of Appeal stated as follows:

While the Bursa remains a body vested with statutory powers there are peremptory requirements that the Bursa itself has to observe and implement to sustain the required orderly and fair market in respect of securities or future contracts. Uppermost it has to act in public interest singularly for the protection of investors in the financial sectors. There is therefore here a

spectrum of matters in the realm of financial implications and complexities. In effect there is a homogenised issue of a public duty and private law matters. The situation warrants a reference to the judicial statement in *R v Securities and Futures Authority ex p Panton* (unreported; 20 June 1994) per Sir Thomas Bingham:- It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but recognition of that jurisdiction must in my judgment be combined with a recognition that *the clear intention of the Act is that the bodies established under that Act should be regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were to look over their shoulder*.

(b) Justice Rohana Yusuf (now President of the Court of Appeal) adopted a similar stance in *Khiudin bin Mohd & Anor v Bursa Malaysia Securities Bhd and another application* [2012] 6 MLJ 131; [2012] 7 CLJ 407 where Her Ladyship said:

> The Court had shown reluctance in interfering with Bursa decision in enforcing its objective done in good faith. The principle of non-interference is premised on the basis that Bursa is a regulatory body mandated under the law to maintain and promote the interests of public members dealing on the exchange, and should be left to carry its objectives unless it acted in excess of jurisdiction.

[58] As such, this court is bound by stare decisis by the cases of *Shahidan bin Shafie, Lai Soon Onn* and *Bursa Malaysia*. Following these cases, if contravention of the CMSA is to form the basis of any claim, sans the SC's determination that there is such contravention of the CMSA, the claim collapses. It is worth mentioning that except for the case of *Apft Bhd v Dato' Faruk bin Othman* [2018] MLJU 1471, all other authorities produced by the plaintiffs' counsel show in fact that it is the regulator, SC, which applied for the freezing order.

[59] Following the cases discussed, the plaintiff's recourse is with the SC, not the Court. Ergo, I find that there is no basis for a freezing order under s 360(1)(d)(D).

Mareva injunction

[60] The plaintiffs' grounds for a Mareva injunction are:

(a) good arguable case:

(i) the plaintiffs asserted that they need only need to show that there is a fair chance that they will obtain a judgment against the defendants based on the evidence available, there is no need to show a very strong case so as to warrant summary judgment against the

defendants — *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 at p 148 and *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1 at p 5;

(ii) the plaintiffs had adduced proof of payments of a total sum of RM1,309,300 to D2, in which D3 and D4 are the directors and shareholders of D2;

(iii) payments received by D2 were not rebutted by the defendants and they had in para 15 of the defence and counterclaim, admitted that the Standard Chartered Bank account number belongs to D2;

(iv) there is no evidence produced by the defendants that D1 is a genuine company and there is every reason to believe that D1 was interposed by D3, D4 and D5 to enter contract with the plaintiffs to prevent the personal liability of D3, D4 and D5;

(v) D2, a two-dollar company with no audited accounts since its establishment in 2015 was set up by D3, D4 and D5 as a facade to receive the investment monies of RM1,309,300 from the plaintiffs;

(vi) D3, D4 and D5 taken as a whole, acted in concert and fraudulently and the veil of incorporation of D1 and D2 must be lifted — *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773 *(FC).*

(b) assets within jurisdiction:

(i) D2 is a company incorporated within Malaysia while D3, D4 and D5 are directors and/or shareholders of the D2 residing in Malaysia;

(ii) evidence show that the D1 has its business address and is carrying out business in Malaysia;

(iii) it is undisputed that D1 is owned by D3 and belongs to PE Group owned by D3 and D5; and

(iv) it is likely that all the defendants have assets in Malaysia.

(c) risk of dissipation of assets and lack of probity:

(i) the plaintiffs argued that when assessing whether there is a risk of assets being removed, a lack of probity and honesty can be determinative in concluding that there is such a risk of dissipation — *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [1999] 4 CLJ 30 at pp 42–43; [1999] 4 MLJ 217 at p 229:

The test to be applied by the court when deciding to exercise its

discretion to grant a Mareva injunction to a plaintiff … is whether, after the plaintiff has shown that he has a good and arguable case and after considering the whole of the evidence before the court, *the refusal of a Mareva injunction would involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction* (*Ninemia*). *Are there facts from which the court, considering the matter in perspective as a prudent sensible man, can properly infer a danger that the defendant will deal with his assets such that he would have no assets within the jurisdiction to satisfy any judgment debt?* (*Third Chandris Shipping Corporation & Ors v Unimarine SA* [1979] 2 All ER 972 at p 987b, quoted in Chai Chup Sengat p 854). In that regard, *the conduct and therefore probity of the defendant is eminently relevant* (*Ninemia; S & F International; Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83 at p 88; *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261, *Amixo Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703). (Counsel's emphasis.)

(ii) it was submitted that there is a real risk of dissipation of assets based on, inter alia, the following factual circumstances:

(iii) it is not disputed that D3 is the Director of D1 and D5 is the CEO and co-founder of the PEG Group;

(iv) it is not disputed that D3 and D4 as the Directors had effective control of D2 whilst D3 and D5 are the authorised signatories of D2's bank account;

(v) D3 and D5 had deceived the plaintiffs to bank in the monies into D2's Standard Chartered Bank account in Malaysia despite knowing that the agreement will be entered between the plaintiffs and D1 which is an offshore company in Seychelles;

(vi) a total sum of RM1,309,300 was banked in to D2's account between 2016 to 2018 by the plaintiffs but no audited accounts was conducted by D3 and D4 since 2015. As such, there is a serious doubt and suspicion as to the whereabouts of the said monies paid by the plaintiffs;

(vii) all the agreements were prepared by D3 and/or D5. It is also not disputed that D3 signed the agreement as the Director of D1. The defendants at all material times are aware that the shares will not be issued to the plaintiffs as promised;

(viii) D3 and D5 also acted dishonestly when they purportedly set up D1 which is an offshore company to enter contracts with the plaintiffs and inserted many ambiguous clauses into the agreements in order to avoid their liability;

(ix) there is a contravention of ss 58, 178 and 179 of CMSA 2007;

(x) the illegal conduct of the defendants imputes dishonesty and lacking in probity giving rise to a real danger of dissipation — *Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83 (CA); *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261 prima facie dishonest conduct' - Singapore Court of Appeal decision in *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703 and the 'illegal conduct' of the defendants 'imputes dishonesty giving rise to a real danger of dissipation' — *Zarina bt Sharil & Anor v Chiong Chuan Hwa & Ors* [2009] 2 MLJ 124 at [50] (HC);

(xi) 'the sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action' — *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 at p 63; [1985] 2 CLJ 228, 282–283; similarly, in the case of *Motor Sports International Ltd (Servants or Agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605 at p 612; [1996] 3 CLJ 483 at p 491, the Court of Appeal agreed and affirmed that:

> the remedy of a Mareva is, after all, equitable relief that is granted *to ensure that the course of justice is not thwarted*. (Counsel's emphasis.)

(d) balance of justice:

(i) the balance of justice and convenience clearly lies in favour of the plaintiffs to ensure that the plaintiffs are able to recover the losses suffered; and

(ii) there is no prejudice caused to the defendants because the defendants had received the total investment sum of RM1,309,300 from the plaintiffs. On the contrary, if the orders sought herein are not granted, there is a real risk that the plaintiffs will not be able to recover anything from the defendants; there is a high possibility that the defendants would take steps to dispose off/dissipate their assets and/or hide the trails of monetary transactions between the defendants, which will stifle any judgment that may be obtained by the plaintiffs against the defendants subsequently.

[61] The defendants however contended that:

(a) the plaintiffs do not have a good and arguable case as there is no reasonable cause of action against the defendants. A good arguable case is one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50% chance of success — *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Nidersachsen* [1984] 1 All ER 398;

(b) there must be some 'solid evidence' to demonstrate the risk of dissipation, and not just bare assertions to that effect — *Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA* [2003] 1 SLR 157; [2003] 1 SLR (R) 157 per Chao Hick Tin JA:

> 18 Clearly, mere assertion that there is a risk of dissipation is not good enough. There must be some 'solid evidence' to substantiate the alleged risk. In the words of Mustill J in *The Niedersachsen*, whose judgment was upheld on appeal (at 406):
>
> > It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there.

(c) in the case of *Menk Sdn Bhd v Joerg Hugo Schmidt* [2009] 3 MLJ 205; [2009] 4 CLJ 795, the Court of Appeal speaking through Suriyadi CJA (as he then was) overturned the High Court's decision in granting a Mareva injunction against the appellant and held (at para 32) that:

> ... It is trite law that in order to succeed in a Mareva injunction application, dissipation of assets per se is incomplete unless the applicant also successfully establishes the fact that the dissipation are preemptive acts that would lead to an intentional stultifying of any judgment that may be obtained. The two ingredients must go hand in hand.

(d) although lack of probity on the part of a defendant may give rise to an inference of risk of the defendant dissipating the assets, the defendants submit that the grounds relied upon by the plaintiffs to draw an inference for want of probity against the defendants are completely misconceived simply because they are merely factual averments made by the plaintiffs which have not been proven or established against the defendants; they are mere assertions without cogent evidence canvassed by the plaintiffs in support of their present claims against the defendants and do not in any way constitute 'previous conduct' of the defendants. In the case of *Ikatan Innovasi Sdn Bhd v Kacc Construction Sdn Bhd* [2007] MLJU 780; [2008] 3 CLJ 48, the court held that lacking in probity is not an absolute factor or a decider to the granting of Mareva injunction (at para 43):

> [43] However, lacking in probity, though a strong factor to be considered as

A to whether or not to grant Mareva injunction, must be seen, in my opinion, in the light of the other circumstances of the case. It is not absolute factor or decider to the grant of Mareva injunction. The equation in this case that because the defendant and the main contractor were purportedly not being honest in their contractual relationship with regard to the plaintiff, therefore the defendant would also likely be not reliable in the plaintiffs expectation to meet the judgment which the plaintiff is likely to obtain in the arbitration proceedings simply does not square. The defendant has, I think, amply demonstrated that it had not taken any steps to put its assets out of reach of the plaintiff. In fact I would say that the defendant has been frank in disclosing all its assets within jurisdiction in its first affidavit.

(e) in the case of *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153, it was held that mere refusal to pay a disputed debt and issuing of a dishonored personal check by a director of the second defendant fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment;

(f) Sundaresh Menon CJ in the Singapore Court of Appeal in *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 held that an allegation of dishonesty cannot obviate the need to establish a real risk of dissipation for three reasons (at paras 65–67):

> 65 In our judgment, the Spectramed proviso goes too far. An allegation of dishonesty cannot obviate the need to establish a real risk of dissipation. This conclusion stands on three planks. The first is a matter of common sense. The fact that a defendant might be crooked does not in and of itself establish that there is therefore a real risk that he will bury his spoils to defeat a judgment that may in due course be rendered against him. The Spectramed proviso fails to distinguish between a defendant against whom a plausible allegation of dishonesty is made but who may turn out otherwise after defending the suit, and one who might be motivated by the pending litigation against him to behave even more dishonestly. Moreover, dishonest conduct can come in different shades and hues. The Spectramed proviso fails to distinguish between different types of dishonest conduct, some of which might more readily support an inference of a real risk of dissipation than others. To take an obvious example, it seems to us wrong in principle to treat a case where there is really no dispute that a grave fraud has been committed with the defendant's involvement, leaving only the precise nature of his role to be determined, in precisely the same way as a case where there may or may not have been fraud or dishonest conduct on the defendant's part at all, that being a matter which can only be determined at the trial.
>
> 66 This leads us to our second point, which is that it is incorrect for the court to treat allegations of dishonesty made at an interlocutory stage as if they have already been established. Such allegations may eventually be refuted. As a matter of principle therefore, the grant of Mareva relief should not generally be wholly founded upon an unproven allegation of dishonesty. This does not

mean that the evidence provided in support of an allegation of dishonesty is irrelevant. But, the objection from principle dictates that the existence of a real risk of dissipation must be assessed independently from the prospect of the plaintiff's eventual success (or failure) in establishing an allegation of dishonesty. This point was made by Chan Sek Keong J (as he then was) in *European Grain & Shipping Ltd v Compania Naviera Euro-Asia SA* [1989] 2 SLR (R) 445 ('European Grain') at [21], where he refused to consider allegations of fraud directed at a defendant when determining whether there was a real risk of dissipation. European Grain was not considered by the court in either Spectramed or OCM Opportunities.

67 Third, the Spectramed proviso is not borne out by either the case law cited in support of it or the larger body of jurisprudence dealing with Mareva injunctions. The fifth edition of Steven Gee's monograph on Mareva injunctions and Anton Piller relief, which was renamed *Commercial Injunctions* (Sweet & Maxwell, fifth Ed, 2004), pulls back (at para 12.040) from the absolute position that the fourth edition of the work (ie, Mareva Injunctions and Anton Piller Relief (cited earlier at [64] above)) took. Commercial Injunctions does not appear to have been drawn at all to the court's attention in Spectramed, and it had not been published yet when OCM Opportunities was decided.

...

93 ... if there is a unifying principle that can adequately rationalise and explain the circumstances in which a court may legitimately infer a real risk of dissipation from nothing more than a good arguable case of dishonesty, it is this — the alleged dishonesty must be of such a nature that it has a real and material bearing on the risk of dissipation. It will be evident from our analysis of the cases that it is in such circumstances that the courts have been willing to draw the necessary inference. This is sensible because whether or not such an inference may be drawn is ultimately a question of fact. In assessing whether the inference is warranted as a matter of fact, it is appropriate, in our judgment, for the court to *segregate* the two questions (ie, whether there is a good arguable case on the merits of the plaintiff's claim and whether it has been shown that there is a real risk of dissipation) and answer them separately. We accept that the evidence relied on to answer the first question may be the same as that relied on to answer the second. But, once the inquiries are segregated, it will be clear that whether the evidence pertinent to the first stage of the inquiry is sufficient also for the purposes of the second stage is an assessment that cannot — and emphatically must not — be made mechanistically; and in that context, if an allegation of dishonesty is all that is relied on, that allegation must be such as to say enough about a real risk of dissipation in the circumstances.

94 In our judgment, a well-substantiated allegation that a defendant has acted dishonestly can and often will, as we have said, be relevant to whether there is a real risk that the defendant may dissipate his assets. But, we reiterate that in each case, it is incumbent on the court to examine the precise nature of the dishonesty that is alleged and the strength of the evidence relied on in support of the allegation, keeping fully in mind that the proceedings are only

A at an interlocutory stage and assessing, in that light, whether there is sufficient basis to find a real risk of dissipation. That alone is the justification which lies at the heart of the court's jurisdiction to grant Mareva injunctions. An allegation of dishonesty does not in itself form a substitute for an examination of the degree of risk of dissipation unless, as we have said, that allegation is of
B a nature or characteristic that sufficiently bears upon the risk of dissipation ...

(g) the terms of the plaintiffs' Mareva injunction application is oppressive by its nature and will have a detrimental effect on the defendants' livelihood. The defendants submit that this goes against the principle
C that a Mareva injunction should not be used as an instrument of oppression, being an equitable remedy granted at the court's discretion provided it is just to do so — *Motor Sports International Ltd (Servants or Agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605; [1996] 3 CLJ 483; and

D (h) the plaintiffs' Mareva injunction application constitutes an abuse of the court's process as it is being used to exert pressure against the defendants although the defendants did in fact before the commencement of this suit negotiate for settlement which were ignored by the defendants.

E FINDINGS AND DECISION

[62] To be entitled to a Mareva injunction, the plaintiffs have to show:

(a) they have a strong arguable case;

F (b) the defendants have assets within the jurisdiction; and

(c) a real risk of the assets being dissipated, or removed before the judgment can be satisfied.

G **[63]** Some recent cases on our shores have decided that 'balance of convenience' is a factor in granting a Mareva injunction. With all due respect, I have serious reservations if this factor applies. Consider the situation where the above three basic governing criterias are met, and it is apparent to the court that there is a clear entitlement to Mareva relief, respectfully, there is then no
H basis to embark on another step to evaluate if the balance of convenience lies in favour of granting a Mareva injunction and find it is inconvenient to stop one from dissipating assets. In my view, the principles concerning the grant of an interlocutory injunction as articulated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 are not applicable in this context.

I *Whether the plaintiffs have a good and arguable case?*

[64] *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62; [1985] 2 CLJ 228, Abdoolcader FJ defined a good and arguable case

at p 64 (MLJ) as:

> Mustill J held in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH UND CO KG* [1984] 1 All ER 398 that: (1) Before a Mareva injunction will be granted, a plaintiff must show first that he has a good arguable case, *which is more than being barely capable of serious argument, but not necessarily one that the Judge believes has got more than a fifty per cent chance of success*

[65] In *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1, the Court of Appeal stated that what is a good and arguable case is difficult to define but held that it would be sufficient if the plaintiff can show evidence that he has a fair chance of succeeding, whilst in *Lien Hoe Sawmill Co Sdn Bhd v Yap Sing Hock & Ors* [1992] 2 CLJ Rep 727 at p 731, Zakaria Yatim J said that unless it is plain that he plaintiff cannot succeed, an arguable defence will not displace a good and arguable case.

[66] In my view, as the plaintiffs have adduced evidence that the total sum of RM1,309,300 had been banked into D2's account and the defendants have admitted that the account belongs to D2, the plaintiffs have a fair chance of succeeding in their claim for moneys had and received and unjust enrichment. The other causes of action such as fraudulent misrepresentation, conspiracy to defraud and injure the plaintiffs; whether the veil of incorporation should be lifted are intensely factual and a matter of evidence to be adduced at trial.

[67] I move on to deal with whether the plaintiffs have satisfied the rest of the prerequisites before the Mareva injunction can be granted.

Do the defendants have assets within the jurisdiction?

[68] In regard to this requirement, as the RM1,309,300 was banked into D2's account at Standard chartered bank and it is admitted by the defendants that this account belongs to D2, this requirement of a Mareva injunction on whether D2 has assets within the jurisdiction is satisfied. However, the mere statement that D1 has a business address in Malaysia, and D3, D4 and D5 resides in Malaysia and 'are likely to have assets in Malaysia' is grossly inadequate in my respectful view to fulfil this requirement.

Whether there was a real risk of dissipation of assets

[69] In considering this prerequisite, I am guided by Jeffrey Tan J (as His Lordship then was) in *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [1999] 4 CLJ 30; [1999] 4 MLJ 217, at p 229:

> The test to be applied by the court when deciding to exercise its discretion to grant a Mareva injunction to a plaintiff … is *whether, after the plaintiff has shown that he has a good and arguable case and after considering the whole of the evidence before the court,*

A *the refusal of a Mareva injunction would involve a real risk that a judgment or award in the pl ainti ff's favour would remain unsatisfied because of the d e fe nd a n t's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction (Ninemia). Are there facts from which the court, considering the matter in perspective as a prudent sensible man, can properly infer a danger that the defendant will deal with his assets such*
B *that he would have no assets within the jurisdiction to satisfy any judgment debt?* (*Third Chandris Shipping Corporation & Ors v Unimarine SA* [1979] 2 All ER 972 at 987b, quoted in *Chai Chup Sengat* p 854). *In that regard, the conduct and therefore probity of the defendant is eminently relevant* (*Ninemia; S & F International; Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83 at 88; *Petowa Jaya Sdn Bhd v Binaan*
C *Nasional Sdn Bhd* [1988] 2 MLJ 261, *Amixo Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703*Amixo Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703). (emphasis added).

[70] I also bear in mind the erudite words of Mohamed Azmi SCJ in
D delivering judgment of the Supreme Court in *Creative Furnishing Sdn Bhd*, at p 155:

> On the facts of the appeal before us, *the respondent must satisfy the court firstly, that he had a good arguable case; secondly, that the appellant had assets within jurisdiction, and thirdly, that there was a real risk of the assets being dissipated or removed before*
E *judgment in that there must be solid evidence to establish the risk. In our opinion, mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant (who was not a party in this appeal), as presented before the learned judge, fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment*.

F

[71] That solid evidence of dissipation must be established is also laid down in *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62; [1985] 2 CLJ 228, as follows:

> Before such relief is granted the plaintiff must secondly show that there is a risk that
G assets will be dissipated: *he must demonstrate this by solid evidence, e.g. that the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon*, but mere proof that the defendant is incorporated abroad will not suffice; ..., and that a refusal of an injunction would involve a real risk that a judgment or award in his favour would
H remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction. (Emphasis added.)

[72] In this case, having examined the affidavit evidence, and bearing in mind proceedings are only at an interlocutory stage, I cannot legitimately find,
I nor is it warranted on my part to infer any risk of dissipation for the simple reason that, whether there may or may not have been fraud or dishonest conduct on the different defendants' part and the role they each played, are matters which can only be determined at the trial. To find there is lack of probity and dishonesty, I simply cannot treat the unsubstantiated allegations of

fraud levelled against the defendants as having being established or have a real and material bearing upon the risk of dissipation. It would have been different all together if, evidentially, there is a good arguable case of fraud before this court. In my respectful view, it will be wrong to conclude that there is risk of dissipation merely because allegations of fraud or dishonesty have been made — *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 at [66], [93] and [94] .

[73] On the evidence before the court, I regret that I do not see any solid evidence to show there is a real risk or danger that the defendants will dispose of their assets which has the effect of frustrating the plaintiffs from recovering the fruits of judgment they are likely to obtain against the defendants as explained in *Pacific Centre Sdn Bhd* or that there is sufficient evidence in this case for a 'prudent sensible man to infer a danger that the defendant will deal with his assets such that he would have no assets within the jurisdiction to satisfy any judgment debt which may be given in the plaintiffs' favour' as held in *Jasa Keramat Sdn Bhd*. There is insufficient basis on the evidence as it stands for this court to find a real risk of dissipation.

[74] Fear that the assets would be dissipated as contrasted to actual evidence of a real risk or danger that they would be dissipated will not meet the requirement. This court has to scrutinise carefully whether what is alleged to have been dishonesty or fraudulent conduct of the defendants by itself without more, justifies the inference that the defendants is likely to dissipate as a Mareva order is draconian in nature — it imposes severe restrictions on the defendants' right to spend their money or otherwise deal with their assets, and there is the real and obvious risk of unfairness to the defendants when the facts are not all ascertained and issues have not been fully determined at trial. The seriousness of making such an order was graphically described by Donaldson LJ in *Bank Mellat v Nikpour* [1985] 2 FSR 87 at p 92 as being, with the Anton Piller order, one of the law's 'two nuclear weapons'.

[75] In my view, the defendants' refusal to pay the plaintiffs 'fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment.' In the circumstances as obtained here, arming the plaintiffs with the Mareva injunction will in my utmost respectful view, put the plaintiffs in the position of a secured creditor.

Balance of convenience?

[76] As alluded earlier, I do not think that the 'balance of convenience' factor applies at all. If I am wrong and it does apply, it is in favour of the defendants — refusal to grant the Mareva injunction will carry the lower risk of injustice.

A [77] For the reasons given, the plaintiffs have not satisfied the requirements for grant of Mareva relief. Thus, the application in encl 11 was dismissed with costs subject to allocator.

Enclosure 10 allowed and encls 11, 13, 18 and 20 dismissed.

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Reported by Ashok Kumar

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